

Before the
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LIBRARY OF CONGRESS
Washington, D.C.

In the matter of:

The Digital Performance
Right in Sound Recordings
and Ephemeral Recordings
Ephemeral Recordings

Docket No. 2005-1
CRB DTRA

(Webcasting Rate
Adjustment Proceeding)

Volume XLVI

Room LM-414
Library of Congress
First and Independence Avenue, S.E.
Washington, D.C. 20540

Wednesday,
November 29, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30
a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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1 P-R-O-C-E-E-D-I-N-G-S

2 9:34 a.m.

3 MR. SMITH: SoundExchange, Your
4 Honor, will call then Charles Ciongoli.
5 Whereupon,

6 CHARLES CIONGOLI
7 was called a witness by Counsel for
8 SoundExchange, and having been first duly
9 sworn, assumed the witness stand, was examined
10 and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. SMITH:

13 Q Mr. Ciongoli, why don't you spell
14 your name and say it for the record since it's
15 a little complicated?

16 A Charles Ciongoli, C-I-O-N-G-O-L-I.

17 Q And where are you employed?

18 A I'm employed in Los Angeles by the
19 Universal Music Group.

20 Q And what is your position at UMG?

21 A I am the Executive Vice President
22 and Chief Financial Officer for the Universal

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1 Music Group North America operations.

2 Q Okay. Now can you briefly
3 summarize your educational background?

4 A I have a bachelor degree focusing
5 in finance and accounting. I am a certified
6 public account, past the CPA examine.

7 Q Okay. And what are your areas of
8 responsibility in your current position?

9 A As an Executive VP and CFO for the
10 Universal Music Group I am responsible for the
11 financial and reporting activities of the
12 record labels, the distribution and
13 manufacturing music and music publishing
14 operations in North America.

15 Q Okay. Can you summarize your work
16 experience in the entertainment field?

17 A I've been involved with
18 entertainment and specifically the recorded
19 music, music publishing businesses for quite
20 some time. Prior to my employment by the
21 Universal Music Group I was with the
22 accounting firm of Pricewaterhouse where I

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1 focused primarily in health care and
2 entertainment. In the mid-'80s one of my main
3 clients was MCA, Inc., which is the
4 predecessor company to the Universal Group.

5 Q Okay. And what point did you go
6 from Pricewaterhouse to a record company?

7 A In 1990 I moved from
8 Pricewaterhouse to MCA Music Entertainment or
9 MCA, Inc. at the time, which eventually became
10 the Universal Music Group. So in 1990.

11 Q Okay. What are the positions
12 you've held since 1990 in the record industry
13 itself?

14 A When I first came to Universal I
15 was the group controller for the record labels
16 manufacturing and distribution and music
17 publishing. Then I was promoted to a vice
18 president and group comptroller, still
19 performing many of the same duties.

20 Then I moved to the record label.
21 I was Vice President of Finance for MCA
22 Records.

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1 And then a few years later I moved
2 over back to the group level which oversaw
3 many of our operations and labels.

4 Became Senior Vice President and
5 then eventually Executive Vice President and
6 Chief Financial Officer.

7 Q Okay. Now you mentioned that
8 there's a publishing operation at UMG, can you
9 describe that for us briefly?

10 A Along with the record labels the
11 Universal Music Group has its own music
12 publishing operation.

13 Q Okay. And is that a separate
14 corporation?

15 A Yes, it is.

16 Q Okay. And what is the approximate
17 market share of the sound recording business
18 at UMG and the music publishing business at
19 Universal Music Group?

20 A In the US, market share is on the
21 record, the record music side is measures by
22 SoundScan. As of the end of the last year 2005

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1 the record labels or the collective UMG record
2 labels had a 31.71 percent market share. The
3 publishing -- on the publishing side it's
4 about 10 to 12 percent.

5 Q Okay. I wonder if you could just
6 clarify the relationship between the two.
7 Does the publishing company only deal with
8 songs that are on records that are sold by
9 UMG?

10 A No, they do not. They administer
11 own and administer copyrights for not only UMG
12 artists and related sound recordings, but also
13 for other record labels.

14 Q Okay. With that background, Mr.
15 Ciongoli, I'd like to turn to your testimony
16 and written rebuttal statement comparing the
17 levels of investment and risk in the two kinds
18 of businesses, the publishing business and the
19 sound recording business. Can you just
20 generally summarize how the two types of
21 businesses compare in terms of the investments
22 required?

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1 A Well, yes I can. While they are
2 somewhat similar in nature, they are fully
3 vastly different. On the recorded music side,
4 the sound recording side, the primary
5 objective is to actually find, cultivate and
6 procure the master recording. Actually find
7 the talent and make the master recording.
8 Where on the publishing side it's really an
9 investment in the musical work or the
10 copyright that is associated with the sound
11 recording.

12 Q Okay. And how do the cost of
13 operations generally vary between the two
14 kinds of businesses?

15 A The cost structure is vastly
16 different. Clearly on the recorded music side
17 their investment in, you know, if you will A&R
18 is tremendous in terms of the actual advances
19 paid to the artists and/or the actual cost of
20 recording the sound recording along with a
21 whole host of other costs that are incurred.

22 Q And how does that compare with the

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1 music publishing business?

2 A The music publishing is, you know,
3 a relatively -- I don't mean to minimize it,
4 but it's a relatively simple business in the
5 sense that they collect royalties, they pay
6 royalties out. Their cost structure is
7 relatively simple and it's really just a
8 matter of housing people.

9 Q Okay. Now let's turn to the issue
10 of risk. How would you compare the two
11 categories of businesses in terms of the
12 riskiness of it?

13 A I think from my perspective
14 clearly the sound recording business, the
15 record business, is very risky in a sense that
16 there is a, as I said earlier, a host of costs
17 as well as investment that is made in hopes
18 that you actually sell records. There is
19 public acceptance of the music that is
20 developed, whereas on the music publishing
21 side generally speaking there are catalogues
22 or there are copyrights that follow the writer

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1 where there is, if you will, an income stream
2 that usually follows the copyrights so that
3 when you're making an investment in a music
4 publishing catalogue or writer, the copyrights
5 tend to come with them. Therefore, there is a
6 history of earnings that minimizes the risk.

7 Q Okay. You say over on page 3 of
8 your written rebuttal testimony at about six
9 lines from the bottom "To some extent the
10 music publishing business resembles a bank."
11 Can you tell us what you meant by that?

12 A Yes. As I just mentioned,
13 generally speaking in the music publishing
14 business the writer retains ownership of the
15 musical work, the copyright. And most
16 publishers in today's world invest in that
17 writer or those copyrights by looking at the
18 historical earnings.

19 So the analogy would be is you
20 have a house, and the house is worth
21 something. I'm now the bank and I want to go
22 loan you some money against that house or you

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1 have mortgage. So you look at the earnings
2 stream from the -- from the catalogue or from
3 the previous musical works. The music or the
4 music publishing company will make an advance
5 against that historical earning, maybe a
6 little bit more if there are future copyrights
7 to come.

8 Q Now, would it be fair to say that
9 the sound recording companies resembles banks
10 as well?

11 A Other than maybe they have deep
12 pockets. But the fact of the matter is is that
13 on the recording music side there is a -- I
14 don't think you can use the same analogy
15 because there is a whole host of services as
16 well as risk that is -- you know, incurred
17 with actually finding, developing, creating
18 the sound recording and then ultimately
19 marketing it, manufacturing you know the
20 physical media by which it is sold. All of
21 those costs are incurred prior to potentially
22 selling one physical unit.

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1 Q And is there a rule of thumb about
2 the chances of given a recording will be
3 successful in the marketplace?

4 A Again, most music it's really
5 about consumer taste and consumer demand. If
6 I knew the answer to that, I would go to Vegas
7 once a year. Because I can't tell you what --
8 what is going to be successful and what's not
9 going to be successful. It's a -- you know,
10 it's a very hit driven business. And the hope
11 is is that -- you know, many are successful
12 but from my experience whether it's one in
13 ten, one in nine, one in twelve tend to become
14 successful.

15 Q Okay. Let's turn then to your
16 discussion of the particular categories of
17 costs or the comparisons you draw. The first
18 one I think is over on pages 5 and 6 on the
19 costs relating to A&R or artists and
20 repertoire .

21 Q Can you tell us what is that
22 function?

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1 A A&R is the -- is the term of art
2 that is used in the -- both the record
3 business and the publishing business as artist
4 and repertoire investment. This is the money
5 that is paid to the talent to basically
6 advance them monies and/or costs incurred to
7 record the sound recording.

8 Q So on the recording side of the
9 house there are sort of two categories of
10 costs that are included here, is that right?

11 A Yes. There is generally the
12 advances to the artist and then there is the
13 actual recording costs that are incurred.

14 Q Okay. And then what are the costs
15 on the publishing side?

16 A Generally speaking on the
17 publishing side it's really just advances
18 against the musical works or the copyrights.

19 Q Okay. In talking about this
20 category of costs, are you including here the
21 cost of the personnel who engage in the
22 function of developing the recordings or

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1 developing the group of song writers that they
2 rely on?

3 A No, I'm not.

4 Q Where is that going to show up
5 later in your testimony?

6 A I believe that is covered in the
7 overhead expenses.

8 Q So these are direct costs
9 exclusive of personnel?

10 A Yes. These would be direct cash
11 expenditures paid to the talent or paid to
12 other -- for other services such as the rental
13 of studios, the rental of equipment, you know
14 cartage fees; all the things incidental to
15 making and recording the sound recording.

16 Q Okay. Referring to page 6 of your
17 written rebuttal testimony, and perhaps it's
18 best just to leave the figures in print
19 without reading them into the record. But if
20 you could, just compare by reference to that
21 the kinds of expenditures that are made at UMG
22 on the record side and then the publishing

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1 side for A&R?

2 A If you note at the top of page 6
3 you can see that clearly there are hundreds of
4 millions of dollars that are incurred as gross
5 A&R expenditure incurred by the record labels
6 as opposed to tens of millions of dollars that
7 are incurred on the publishing side.

8 Q Okay. Now you draw an distinction
9 here between those figures of gross
10 expenditures and then net A&R expense later on
11 further down on the same page. Can you tell
12 us what the difference between gross and net
13 is in this context?

14 A Yes. Gross expenditures, the
15 actual cash paid in terms of, you know,
16 advances and recording costs. What the net
17 A&R expenses, that's actually the amount of
18 money that is written off into the P&L whether
19 annually or otherwise. In this case the
20 figure represented here in about the middle of
21 the page is the 2005 A&R monies that were in
22 fact expenses or deemed to be not recoupable

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1 or the permanent investment, if you will, in
2 that year.

3 Q Okay. And how do the net A&R
4 expenses of the two businesses compare then?

5 A If you -- if you note, there
6 clearly are tens of millions of dollars
7 incurred as an expense on the record label
8 side as contrasted to the publishing company
9 that actually had a net positive or a recovery
10 in 2005. What that recovery represents is the
11 fact that the publishing company may have
12 written off costs in a previous year for which
13 they actually had income or recouped the cost
14 in 2005.

15 Q Is that an atypical result for the
16 publishing business in terms of its ability to
17 recoup the costs of A&R?

18 A Generally the net A&R expense for
19 a publishing company is relatively low, again
20 because of the way in which they evaluate
21 their risk and they invest into the catalogue.
22 There is clearly money always coming in

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1 against the historical copyrights.

2 I believe or at least for our
3 company, Universal Music Publishing, I believe
4 the last three to five years actually had a
5 net positive or recovery from previously
6 written off amounts.

7 Q Okay.

8 MS. ROSENSTEIN: Your Honor, if I
9 may move to strike that last statement
10 regarding the description of the timing. That
11 was outside of his rebuttal statement.

12 CHIEF JUDGE SLEDGE: Mr. Smith.

13 MR. SMITH: Your Honor, those
14 exact figures appear in the exhibit that is
15 incorporated in his statement, Exhibit 30. It
16 doesn't expressly talk about those years in
17 the statement, but I was just trying to get us
18 an elaboration to see whether or not this --
19 we just picked just one that was atypical.

20 CHIEF JUDGE SLEDGE: What was the
21 exhibit?

22 MR. SMITH: I'm sorry. Exhibit 30

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1 attached. It's Exhibit 30, Your Honor.

2 CHIEF JUDGE SLEDGE: That's not my
3 question.

4 MR. SMITH: I'm sorry. What is
5 the exhibit cited in the statement?

6 CHIEF JUDGE SLEDGE: Where.

7 MR. SMITH: If you could just give
8 me a minute on it, Your Honor. It is cited,
9 for example, on line 4 on page 8. It is the
10 basis of almost all the data relating to the
11 publishing business here. On line 5 on page 9.
12 Many other places. It is essentially the
13 summary of the data that he then goes on to
14 describe.

15 CHIEF JUDGE SLEDGE: Ms.
16 Rosenstein?

17 MS. ROSENSTEIN: It's the
18 description of the trending and the reasons
19 behind the years which were not explained in
20 his written statement nor during his
21 deposition and questioning.

22 CHIEF JUDGE SLEDGE: Overruled.

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1 BY MR. SMITH:

2 Q Now, you also, Mr. Ciongoli,
3 report these net A&R expenses in the form of
4 a percentage of net sales or net revenue, is
5 that right?

6 A Yes, I do.

7 Q And can you tell us why you did
8 that?

9 A Really more so to be -- to show
10 pictorially in a graph sort of way the
11 relative size, if you will, as compare and
12 contrasted from the publishing business to the
13 record company.

14 Also to take out any sort of apple
15 and orange comparison or any sort of scale, if
16 you will. So it's easier to compare and
17 contrast as a percentage of your net revenues
18 the types of costs that are incurred.

19 Q And is it figure 1 that then shows
20 the comparison in graphic form of the relevant
21 percentages for A&R costs?

22 A Yes, it does. I believe you can

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1 see at the top of page 7 figure 1 clearly
2 there is a relative percentage of the revenues
3 incurred as the A&R expense verses on the
4 publishing side, which is to the right, is
5 actually a negative number which means it's a
6 positive or an income item because they
7 actually have positive recoveries in 2005.

8 Q Now let's turn from A&R to
9 marketing costs. And could you just tell us
10 without getting to the figures yet, what kinds
11 of marketing activities a record business does
12 as opposed to a publishing business?

13 A Generally speaking the publishing
14 company does not incur marketing expenses.
15 They're not in the business to market and
16 promote the sound recording.

17 On the record company side clearly
18 there is a significant investment in the
19 making of the videos, the imagining of the
20 artist. Once the sound recording is actually
21 made, then the marketing plan is put together
22 and there's a whole host of costs that are

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1 incurred as a result of that.

2 Q Okay. And I wonder can you tell
3 us does the music publishing company then
4 benefit from the marketing efforts of the
5 record company?

6 A Yes, they do. Obviously when the
7 record company markets and promotes the sound
8 recording and there ultimately is sales to the
9 extent that there are physical sales, digital
10 sales, any sort of income, obviously the
11 publishing benefit from that because they
12 receive their income from those sales.

13 Q Okay. And if you could then, just
14 turn to the bottom of 7 and top of page 8.
15 And, again, without giving us the exact
16 figures, sort of draw the comparison between
17 how much is expended at Universal in marketing
18 on the record side as opposed to on the
19 publishing side?

20 A Again, I think at the lower part
21 of page 7 and the top of page 8 you can see
22 that, again, hundreds of millions of dollars

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1 were spent on the recorded music side as
2 opposed to almost nothing on the publishing
3 side. What I tried to do is even pull
4 together as part of -- which is really
5 incurred as part of the overhead, there is a
6 very small amount of money incurred what we
7 would call publicity and promotion, and even
8 travel and entertainment expenses related to
9 publishing. That expenditure really relates
10 to things like trade advertising where, for
11 example, a music publisher may take out an ad
12 in one of the industry magazines complimenting
13 or thanking one of their writers for a
14 successful year or being, you know, songwriter
15 of the year, what have you. It's not the
16 traditional marketing incurred similar to a
17 record company.

18 Q Okay. Just so we're clear here,
19 again, we're not talking in this section about
20 the costs of personnel who may be involved in
21 promoting music records or songs, is that
22 right?

1 A No, we're not. This is direct
2 costs paid to -- to third parties.

3 Q Okay. The third category then is
4 where we get to personnel, correct, over here?

5 A Yes, it is.

6 Q Can you tell us what's included in
7 the category of overhead in the way you have
8 it laid out here?

9 A Yes. The overhead consists of the
10 A&R personnel, the marketing personnel, any
11 sort of sales personnel on the label side,
12 executive oversight, finance, royalties,
13 copyright, administration; all of those people
14 associated are considered to be the overhead
15 of the company. And the costs included in
16 that would be the salary and benefits, the
17 facility costs, the T&E, things of that
18 nature.

19 Q Okay. And can you tell just
20 roughly how the overhead costs of the record
21 company and the music publishing company
22 compare?

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1 A If you-- I think on page -- on
2 page 9 the top third of the page you again see
3 that there are hundreds of millions of dollars
4 incurred in overhead related to the recorded
5 music side as opposed to only tens of millions
6 of dollars on the music publishing side.

7 Q And does that distinction go away
8 when you convert it to percentages of net
9 sales?

10 A No. If you look at figure 3 in the
11 middle of the page you can see that it's the--
12 percentage basis, it's more than doubled the
13 amount as a percentage of the revenues that
14 are spent in the overhead. Again, that's
15 because there's a whole host of services that
16 are incurred and provided on the recorded
17 music side versus the publishing side.

18 Q Okay. And then the final category
19 is manufacturing the distribution costs. What
20 are we talking about here?

21 A This is -- clearly, again, another
22 cost category that the music publishing

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1 company does not incur. It is the cost to
2 manufacture and distribute the physical
3 product. Although we are moving more towards
4 a digital world, you know, the world is
5 changing, we still have a substantial portion
6 of our business, that is that we actually sell
7 physical CDs. So this is the cost to
8 manufacture and distribute those CDs.

9 Q And where are the figures in your
10 testimony that tell us how much UMG on the
11 record side spent on manufacturing and
12 distribution respectively in 2005?

13 A At the lower part of page 9 you
14 can see that there was again hundreds of
15 millions of dollars incurred in manufacturing
16 and inventory related times. And then, again,
17 another tens of millions of dollars on
18 distribution and selling expenses. And then--

19 Q What does figure 4 show then?

20 A Figure 4 on page 11, again, shows
21 as a percentage of the revenues how much is
22 incurred by the record labels. And, again,

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1 there was nothing incurred on the publishing
2 side. But this is not an activity that they
3 incurred.

4 Q Okay. Now I want to just have you
5 refer if you could now to the two exhibits,
6 SoundExchange Exhibit 29RR and SoundExchange
7 Exhibit 30RR. And could you tell us what each
8 of these is?

9 A Yes. Exhibit 29 is a historical
10 income statement for the recorded music side
11 from 1999 to 2005 starting with gross sales
12 down to essentially net profit. And on
13 Exhibit 30 it's the similar income statement
14 for the music publishing with revenues down to
15 their net profit.

16 Q And referring to these two
17 documents can you compare the profitability of
18 the two businesses?

19 A It does have profitability. But I
20 think, again, looking at it from a percentage
21 or I like to look at it as a return on
22 investment --

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1 Q Okay. Let's look at it that way.

2 A Okay. If you look at just, again,
3 I think about two-thirds of the way down I
4 think probably the best comparative number
5 would be the EBIT number.

6 Q You're looking at Exhibit 29?

7 A Yes, I am. Sorry. Exhibit 29. In
8 2005 the EBIT number as a percentage of saying
9 net sales, which is about a third of the way
10 down on the top page, is you know a little bit
11 more than single digit return on investment.

12 If you then flip to Exhibit 30 and
13 you were to do the same comparison on the
14 music publishing side, there would be in 2005
15 as a percentage of their revenues, which is
16 about maybe a third of the way down again, is
17 almost double that.

18 So clearly you know, again, a
19 relative return on sales the publishing
20 company because their cost structure is so
21 much different than the recorded music side,
22 their actual return on investment is -- is

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1 actually more positive.

2 Q Could you just elaborate a little
3 bit more on why it is that the music
4 publishing side is such a markedly higher
5 return on investment?

6 A I think you just -- you know, from
7 again an appearance perspective you can see
8 that the income statement for Exhibit 29 is
9 very complicated. It has a lot of lines
10 because there are lots of services or lots of
11 costs incurred as part of the cost structure
12 of the recorded music side, whereas in
13 contrast to the music publishing income
14 statement it's a very simple cost structure,
15 very simple P&L which is they collect the
16 revenues, they pay out the royalties to the
17 writers. Again, there's a small amount of
18 what we call A&R. The net A&R investment is
19 relatively small. And then there's overhead.

20 The music publishing business is
21 generally a very scalable business.

22 Q What does that mean?

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1 A Scalable in the sense that their
2 overhead is relatively fixed or their cost
3 structure is relatively fixed. And once you,
4 obviously, cover those fixed costs, you then
5 end up having more return on sales.

6 MR. SMITH: That's all I have,
7 Your Honor.

8 CHIEF JUDGE SLEDGE: Ms.
9 Rosenstein, any questions?

10 MS. ROSENSTEIN: Thank you, Your
11 Honor.

12 CROSS EXAMINATION

13 BY MS. ROSENSTEIN:

14 Q Good morning, Mr. Ciongoli.

15 A Good morning.

16 Q I'm Gayle Rosenstein. You recall
17 we met at your deposition on November 3, 2006
18 in Los Angeles?

19 A Yes, I recall.

20 Q We're going to go over much the
21 same material we did on that day.

22 Just to further clarify a bit

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1 about your background. You first jointed the
2 company in 1990?

3 A That is correct.

4 Q And at that time you were the
5 comptroller for three different groups: MCA
6 Records, MCA Nashville and MCA Publishing?

7 A MCA Records and MCA Nashville were
8 two of the record labels within the company.
9 And then there was the distribution and
10 manufacturing company, which was MCA
11 Distributing. And then Universal Music
12 Publishing.

13 Q And you were the comptroller for
14 those three groups?

15 A That is correct.

16 Q And since that time you've had
17 several jobs at the company, as you testified?

18 A Yes, that's correct.

19 Q In your testimony you discuss that
20 you became Senior Vice President Finance for
21 MCA Entertainment. This was about n the mid-
22 1990s?

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1 A That's correct.

2 Q And at that time the company was
3 expanding in all of international into Japan,
4 Germany, the UK and Canada and you helped
5 oversee some of those operations beginning at
6 that time?

7 A That's correct.

8 Q And therefore in the mid-1990s you
9 understood financially how MCA Entertainment's
10 music was licensed broadly in Japan, the U.K.
11 and Canada?

12 A That's correct.

13 Q And you understood the financial
14 terms of those arrangements at that time?

15 A Just to be clear, in terms of
16 licensing from the United States to those
17 territories and vice versa?

18 A Correct.

19 Q Yes, I understood those terms.

20 Q And then in 1998 your focus became
21 the North American group?

22 A That is correct.

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1 Q And then in 2003 you were promoted
2 to Executive Vice President and Chief
3 Financial Officer for Universal Music Group
4 North America?

5 A That sounds correct.

6 Q And at that time Universal Music
7 Publishing Group began to report up through
8 you and continues to do so today?

9 A It actually reported prior to
10 that. But, yes, that is true.

11 Q And the North American group now
12 encompasses Canada, Mexico, Central American
13 and U.S. Latino?

14 A Yes.

15 Q As the Chief Financial Officer for
16 UMG North America you are ultimately
17 responsible for financial reporting for the
18 North American organization, is that right?

19 A For the North American record
20 labels as well as music publishing.

21 Q And there's also a CFO for
22 Universal Music Group International?

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1 A That is correct.

2 Q And that person takes care of the
3 rest of the world that's not in your
4 territory?

5 A That's correct.

6 Q And his name is Lloyd Muir, M-U-I-
7 R?

8 A That's correct.

9 Q And you converse quite frequently
10 with Mr. Muir at least one or two times per
11 week?

12 A Something like that, yes.

13 Q In fact, you read the financial
14 reporting for United Kingdom and other areas
15 of the world as they roll up into the
16 financials as a whole?

17 A There is financial information
18 associated with the U.K. and the rest of the
19 world that I have access to, that's correct.

20 Q And that you do read?

21 A Yes, I do.

22 Q Therefore, you know for example

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1 how the U.K. company or the German company,
2 the Brazilian company and the Japanese company
3 are doing financially against their current
4 year plans and other prior years?

5 A Yes, I do.

6 Q As a Chief Financial Officer of
7 UMG North American you review financial
8 information on a monthly basis, correct?

9 A Yes, that's correct.

10 Q And that financial information
11 includes sales activity?

12 A Yes, it does.

13 Q Marketing activity?

14 A Yes.

15 Q A&R activity?

16 A Yes.

17 Q Revenue information?

18 A Yes.

19 Q Profit information?

20 A Yes.

21 Q Expenses?

22 A Expenses in the sense of overhead?

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1 Q Correct.

2 A Yes.

3 Q Essentially the whole shebang?

4 A The whole income statement, yes,
5 that's correct.

6 Q And there are four divisions that
7 you now oversee, correct? I'm sorry, three
8 divisions; labels, manufacturing and
9 distribution and then publishing?

10 A That's correct.

11 Q And you oversee accounting
12 reporting for all of their financial
13 divisions?

14 A That's correct.

15 Q And that includes being in charge
16 of budgeting?

17 A Yes.

18 Q And you're in charge also of
19 performance monitoring, which is performance
20 in terms of measuring against a plan or
21 measuring against a prior year?

22 A Yes.

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1 Q Are you familiar with the term
2 ancillary markets?

3 A Yes, I am.

4 Q And ancillary markets in your
5 understanding of the word are things that are
6 not "normal and customary markets" in which
7 Universal normally sells its CDs, correct?

8 A Yes.

9 Q I'd like to discuss now with you
10 your rebuttal statement. If you'll turn to
11 the first full paragraph on page 3. Here you
12 say "It is therefore unsurprising that the
13 risks and rewards and the level of
14 compensation for sound recordings and musical
15 works differ greatly in markets where music is
16 disseminated." Did I read that correctly?

17 A Yes, you did.

18 Q And here when you're talking about
19 the market where music is distributed, you're
20 really talking about the sale and distribution
21 of the sound recording, correct?

22 A That's correct.

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1 Q And it's true that this type of
2 level of compensation would differ greatly if
3 it was just the public performance of the
4 composition versus the sound recording, right?

5 A I'm not sure I understand your
6 question.

7 Q Currently the record companies do
8 not get compensated for public performances of
9 the composition, do they?

10 A To make sure I understand your
11 question, to the extent that public
12 performance monies from terrestrial radio are
13 paid to the publishing companies and not the
14 record companies, I agree with that statement.

15 Q And therefore this type of
16 compensation does differ greatly if it's just
17 public performance versus something else?

18 A Yes. I'm not quite sure of your
19 question. You say it "differs greatly."

20 Q Meaning the record labels don't
21 get paid for public performance currently of
22 published works in the --

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1 A From terrestrial radio, that's
2 correct.

3 CHIEF JUDGE SLEDGE: So as I
4 understand it, in answer to the question
5 public performance means play on broadcasting?

6 THE WITNESS: That's my
7 understanding, yes.

8 CHIEF JUDGE SLEDGE: That's an
9 unusual definition of that phrase, but I
10 wanted to make sure I understood it.

11 BY MS. ROSENSTEIN:

12 Q Moving on to the next paragraph on
13 page 3 of your statement. It says "A record
14 company invests large amounts of money before
15 final product is created." Did I read that
16 correctly?

17 A Yes.

18 Q And here as you said before when
19 you talk about final product, you mean the
20 sound recording that will ultimately be sold
21 or the compact disk?

22 A That's correct.

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1 Q Actually if we turn quickly to the
2 bottom of page 2, the last sentence reads:
3 "Although they do have to pay a basis against
4 royalties to songwriters or their publishing
5 designees. Music publishers are able, to a
6 large degree, to ride the coattails of the
7 record company." Did I read that correctly?

8 A Yes, you did.

9 Q Now, Mr. Ciongoli, you also play a
10 role in the process of determining advances
11 that are offered to any particular artist, do
12 you not?

13 A Yes, I do.

14 Q And that role is to help approve
15 certain advances over what you have referred
16 to as the table of authority?

17 A That is correct.

18 Q And can you please explain to the
19 Court what that table of authority is for the
20 labels with respect to artist advances?

21 A Like any sort of corporation, we
22 have approval limits that we allow our record

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1 labels to invest money under. And if they
2 exceed those limits or that table of
3 authority, they must come to a higher level to
4 get approval to spend additional dollars.

5 Q And what is that dollar level at
6 the labels currently?

7 A Currently at the labels it's a
8 million and a half.

9 Q And there's also a table of
10 authority for the publishing division with
11 respect to advancements to artists or writers,
12 correct?

13 A Yes.

14 Q And what is that current table of
15 authority?

16 A For the music publishing company
17 it's one million.

18 Q And, therefore, when the music
19 publishing company wants to extend an
20 advancement to an artist or a writer below one
21 million, that publishing company has the
22 authority to do so?

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1 A That is correct.

2 Q How often does someone from the
3 publishing division seek approval over that
4 one million dollar table of authority of you?

5 A It -- it -- it depends greatly on
6 the amount of activity and, you know, what is
7 available at the time. It's -- it's hard to
8 say.

9 Q It does happen, though, from time-
10 to-time depending on the transaction they're
11 trying to culminate?

12 A That's true, yes.

13 Q Okay. How often does someone from
14 the label side seek approval over the table of
15 authority?

16 A Far more than the publishing
17 company.

18 Q Would you agree again it depends
19 on the amount of activity and the deal itself,
20 just like with the publishing side?

21 A Yes.

22 Q Keeping on page 2 of your rebuttal

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1 statement, I would like to go to the last
2 sentence that trails over to page 3. And this
3 sentence reads: "Unlike record companies,
4 music publishers do not incur significant
5 recording, marketing, promotion, sales,
6 creative services, video or personnel costs.
7 Rather the record companies incur those costs
8 and the publishers are the beneficiaries of
9 the record company's work and investment."
10 Did I read that correctly?

11 A Yes, you did.

12 Q Isn't this statement that music
13 publishers do not incur significant marketing,
14 promotion and sales, creative services, video
15 or personnel costs somewhat inconsistent with
16 your testimony that from time-to-time the
17 publishers do seek approval to exceed the
18 table of authority from you?

19 A No.

20 Q And why not?

21 A Because, again, what they -- they
22 don't incur recording costs, they don't incur

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1 marketing costs. Most of the money that
2 they're seeking for approval is really an
3 advance against the catalogue to purchase a
4 catalogue, to give a writer an advance. Their
5 -- their approval is not to seek any of this
6 type of expenditure.

7 Q Isn't their approval to seek over
8 one million dollars of advance to the artist
9 or the writer?

10 A The table of authority has a whole
11 host of terms in it. There are particular --
12 for example, artist advances and recording
13 costs we were talking about is the one million
14 and the one and a half million. To the extent
15 that there are video costs, that's a lower
16 threshold.

17 So for example, a label would have
18 to seek approval to spend money over a table
19 of authority or an approved limit for videos.
20 There is no such term in the publishing table
21 of authority because they don't incur videos.

22 So the comparison of the one to

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1 one and a half is solely on A&R related costs.

2 Q On A&R related costs, the reason
3 there is a table of authority is one million
4 dollars is a significant expenditure, correct?

5 A That is correct.

6 Q And therefore your statement that
7 music publishers do not incur significant
8 marketing promotion, sales, creative services,
9 video or personnel costs is inconsistent
10 somewhat with your statement that sometimes
11 they do incur one million dollars in artist
12 advances?

13 A I -- I completely disagree with
14 you. I think you're comparing apples and
15 oranges.

16 Q Would you agree with me that
17 sometimes the -- from time-to-time the
18 publishing side does incur significant A&R
19 costs?

20 A They incur significant advances
21 from time-to-time.

22 Q Let's now turn down to page 4 of

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1 your statement. Halfway down in the paragraph
2 under "comparison of investment risk and
3 operations of sound recording in music
4 publishing business" there's a sentence that
5 reads: "Universal Publishing spends little or
6 nothing to create market, promote, manufacture
7 and distribute copyrighted musical works." Do
8 you see that sentence?

9 A Yes, I do.

10 Q Did I read that correctly?

11 A Yes, you did.

12 Q Isn't this statement also a bit
13 inconsistent with the fact that you sometimes
14 approve over one million dollars in A&R
15 expenditures on the publishing side?

16 A Again, I disagree with you.

17 Q Universal Publishing worldwide is
18 a stand alone company, correct?

19 A Yes, it is.

20 Q And your statements on page 4
21 you're only referring to the U.S. operations
22 of the worldwide company?

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1 A That is correct.

2 Q Do you have any reason to believe
3 that the international operations regarding
4 the matters you address in your testimony here
5 are fundamentally or materially different than
6 that in the United States?

7 A In terms of the operation of music
8 publishing?

9 Q Yes.

10 A They're not materially different.

11 Q In the paragraph under comparison
12 of investment risk, operations of sound
13 recording and music publishing business still
14 you discuss generally differences in what you
15 perceive to be the general business models and
16 the way in which these two companies are
17 selling, promoting, creating the sound
18 recording versus the musical work, correct?

19 A Yes.

20 Q And this same type of model that
21 is used in the primary market is not used in
22 ancillary markets, is that right?

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1 A Again, I'm not quite sure I
2 understand the parallel you're trying to draw
3 or the question.

4 Q Okay. You talk about a type of
5 model that's used on page 4 of your rebuttal
6 statement, correct?

7 A Yes.

8 Q And that model is for the sale and
9 distribution of a CD, correct?

10 A Yes, it is.

11 Q And that model's not applicable to
12 what we referred to as ancillary products or
13 ancillary markets?

14 A I'm -- I'm not quite sure I agree
15 with your analogy in the sense that the
16 business -- the traditional business model is,
17 as I sit here today, is 80 to 85 percent of my
18 business still selling physical product.
19 However, as I mentioned earlier, the business
20 model is changing. The business model in the
21 sense that we are moving to more of a digital
22 world. Consumers are consuming more music

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1 than they've ever consumed before in a variety
2 of ways. Whether it is through P to P
3 services, legal or illegal, whether it's
4 through download services, whether it's
5 through master tones, what have you. So the
6 notion of ancillary markets I think is getting
7 somewhat blurred.

8 I think as we move -- as we
9 continue to move towards digital services and
10 started selling product more in the digital
11 space and we take advantage of the newer
12 technologies, I think that there will
13 ultimately -- these ancillary markets will
14 become more mainstream revenue sources for the
15 record company and maybe even the music
16 publishing company.

17 Q They're not currently mainstream
18 marketing for the company, correct?

19 A Again, currently is a relatively
20 term, I think. We are moving towards in the
21 future, you know, different revenue streams.
22 We are now garnering revenue from a whole host

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1 of revenue streams.

2 So to say -- to be finite and say
3 ancillary today may not be ancillary tomorrow
4 or three years from now.

5 Q But it's ancillary today?

6 A Again, it's just a categorization.
7 I don't think necessarily think it is -- it is
8 -- again, it's -- it's maybe a relatively
9 small amount of income today, but it could
10 become a major source of revenue in the
11 future.

12 Q What about the -- talking about
13 again the relative risk in the business model
14 on page 4 of your rebuttal statement. Is this
15 model applicable for ancillary markets when
16 you define it as master use or sync licenses?

17 A Again, ancillary -- I just want to
18 be clear. If I turn to Exhibit 29. If you're
19 referring to ancillary income or ancillary
20 markets; if we're referring to ancillary
21 income on the P&L, which is a very small
22 number, is not referred to as synchronization.

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1 That would be more so in licensing income.

2 So to the extent that licensing is
3 a more material part of our business today, I
4 would say that this business model does also
5 cover some of that. Because when we are --
6 when we are selling a -- or promoting an
7 artist or a sound recording we know that there
8 will be income from -- derived from a whole
9 host of sources.

10 Q Mr. Ciongoli, I've put in front of
11 you your deposition testimony from November 3,
12 2006. If you could please turn with me to page
13 60.

14 And we have marked your deposition
15 transcript as Services Exhibit 54.

16 (Whereupon, the document
17 referred to was marked
18 for identification as
19 Services Exhibit R-54.)

20 BY MS. ROSENSTEIN:

21 Q If you could please read pages 9--
22 I'm sorry. Page 60 lines 9 through page 61

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1 like 12 to yourself?

2 A This would be the lower -- the
3 lower right?

4 Q Page 60 would be the upper right
5 hand corner --

6 A 60, I'm sorry.

7 Q Starting at line 15 on the left
8 hand side all the way down to line 12.

9 Did you read the statement?

10 A Yes, I did.

11 Q And during your deposition on
12 November 3, 2006 I asked you whether the same
13 type of market under the comparison of
14 investment, risk and operation of sound
15 recording and music publishing business is the
16 same type of model that would be applicable in
17 ancillary markets such as sync licenses or
18 master use licenses. And your answer to me
19 was "I'm not quite sure I understand the
20 comparison, but I believe the answer is no."

21 And I asked you: "And why do you
22 believe the answer is no?"

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1 And you said "Because the
2 ancillary markets or the synchronization or
3 the licensing is a direct result of a
4 fundamental investment vis-à-vis creation of
5 the sound recording. The -- you know, the
6 promotion, the marketing the -- you know, just
7 the nature of consumer acceptance of the sound
8 recording and the popularity of it that allows
9 it to move into these ancillary markets and be
10 able to be licensed because now it is
11 something that, you know, somebody is willing
12 to say its popular, it's reactive, the
13 consumer enjoys it. Therefore, we are willing
14 to go ahead license it in these ancillary
15 markets." Did I read that correctly?

16 A Yes, he did.

17 Q And that was a correct statement
18 on November 3, 2006?

19 A Yes.

20 Q And that's still your testimony
21 today?

22 A Yes.

1 Q Okay. Is it true that the types
2 of investments that are made for sale and
3 distribution are different than the types of
4 investments that are made for master use and
5 sync licenses?

6 A Again, I guess I'm -- I'm -- when
7 you say the types of investments made for
8 master uses, generally as I think I said in my
9 deposition the amount of -- you don't
10 necessarily invest for synchronization on the
11 recorded music side. It is part and parcel of
12 the whole, you know, commercial viability of
13 the song or the use of the song after it has
14 been publicly accepted. So there's not a lot
15 of investment made per se in the -- in the
16 synchronization world, if you will, on the
17 sound recording side.

18 Q And it's true that the types of
19 investments that are made for sale and
20 distribution are different than the types of
21 investments that are made in ancillary
22 markets, correct?

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1 A Again, defining ancillary markets
2 as synchronization markets?

3 Q Defining ancillary markets more
4 broadly as you defined them earlier?

5 A Yes.

6 Q And that's because Universal
7 usually invests in the primary market, which
8 is to market and promote the artists so that
9 you can sell CDs?

10 A We -- we -- we invest in the
11 artist so that we can create a sound recording
12 that can be exploited in a variety of ways.

13 Yes, it is true to say that in
14 today's world we garner a substantial amount
15 of our income from the sale of CDs, not to say
16 that we are not going to garner income from
17 a variety of revenue streams in the future
18 that are different from today's model because
19 of technological changes or the way our
20 business models are in fact changing.

21 So that if you look at our
22 business today versus how you looked at it

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1 five years ago, it is completely differently.

2 Q And the types of investments that
3 you make today include the fact that you don't
4 invest in ancillary markets? You focus your
5 investments in the primary market, which is
6 defined as selling CDs, correct?

7 A I would not say it's that black
8 and white. Again, the investments made today
9 are going to garner revenue streams from a
10 variety of markets today and in the future.
11 And in those -- in today's world, again, we
12 may have 80 to 85 percent of our revenues
13 flowing from CDs, whereas in the future that
14 number if you look at all the statistics
15 whether it's the Pricewaterhouse, you know, or
16 the Enders or any of these sort of industry
17 surveys, the physical market is decaying. The
18 digital markets are increasing. Ancillary
19 markets are going to become major players in
20 terms of deriving revenue for content
21 companies in the future.

22 MS. ROSENSTEIN: I would like to

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1 move to strike his answer to my question as
2 nonresponsive.

3 CHIEF JUDGE SLEDGE: Mr. Smith?

4 MR. SMITH: Well, Your Honor, the
5 question asked for him to deal with confusing
6 concepts. He was trying to explain his answer.
7 It was directly responsive.

8 CHIEF JUDGE SLEDGE: I don't see
9 that answer being different than his earlier
10 distinctions that he's raised with the terms
11 that you're using. I'll deny that motion.

12 BY MS. ROSENSTEIN:

13 Q If you'll turn with me to page 61
14 of your deposition starting at line 13 and on
15 to line 21. I asked you "So the types of
16 investments that are made for sale and
17 distribution are different than the types of
18 investments that are made in ancillary
19 markets?"

20 And you responded: "Yes, we
21 generally don't invest in ancillary markets.
22 It's usually a result of the investment in the

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1 primary market, which is to market and
2 promote, you know, the artists so we can sell
3 CDs." Did I read that correctly?

4 A Yes, you did.

5 Q And was that a true statement on
6 November 3, 2006?

7 A That is -- yes, that it was.

8 Q And is that still a true statement
9 today?

10 A Yes, it is.

11 Q I'd like to turn now to page 5 of
12 your rebuttal statement regarding A&R
13 investments.

14 First, before we go into your
15 specific statements, is it true that there is
16 not an A&R component to licensing?

17 A In the general sense, no. But
18 there are advances from time-to-time paid or
19 received as a result of licensing.

20 Q And for the record, I think my
21 question was a little unclear. I said is it
22 true that there is not a component of

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1 licensing, which was a double negative.

2 ~~Is there~~ Is there to your knowledge an A&R
3 component to licensing?

4 A If I understand your question
5 correctly, A&R defined as advances and
6 recording costs, from time-to-time when there
7 is a license that is procured an advance may
8 be paid or received depending if we're
9 licensing and/or licensing out a track.

10 JUDGE ROBERTS: Mr. Ciongoli, A&R
11 is advances in recording? I thought it was
12 artist and repertoire?

13 THE WITNESS: It is. A&R is artist
14 and repertoire, but from time-to-time when you
15 license -- it -- it involves the payment of
16 advances and the recording costs.

17 So if I understood Ms.
18 Rosenstein's question correctly, when we
19 license a track to somebody else or we license
20 in a track from somebody else to put on a
21 compilation, there are usually advances paid
22 to the repertoire owner, the A&R owner, the

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1 repertoire owner. In case -- and in our case
2 if we owned the song, we will ask another
3 label, okay, you want to license it and you
4 want to sell it or exploit it, then pay us an
5 advance or an advance against the royalties
6 that will be otherwise due us. So that's the
7 advance or the A&R monies.

8 And I guess we're using that term
9 of art somewhat loosely here. But it's really
10 advances that we're -- I believe what we're
11 talking about, sir.

12 JUDGE ROBERTS: Okay. If you
13 could in the future make that distinction when
14 you're talking about advances and recordings
15 as opposed to artist and repertoire, that
16 would help.

17 THE WITNESS: Understood. I
18 apologize.

19 BY MS. ROSENSTEIN:

20 Q Going back to page 5 if you look
21 at the last sentence of the second paragraph
22 under artist and repertoire investments, it

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1 says--

2 A I'm sorry.

3 Q The last sentence of the second
4 paragraph on page 5 says "Overall the risk of
5 investment falls almost completely on the
6 record company." Did I read that correctly?

7 A Yes.

8 Q Do you deny that the publishers
9 engage in the best months to find writers
10 prior to them having a sound recording
11 contract?

12 A From time-to-time they do invest
13 in unsigned writers that do not have a
14 recorded music deal or a contract.

15 Q Sometimes that happens?

16 A Yes, that's correct.

17 Q Okay. And as we discussed,
18 sometimes the publishing division approaches
19 you for authority for artist advances over one
20 million dollars?

21 A That's correct.

22 Q Okay. With respect to artist and

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1 repertoire investment the labels and
2 publishing companies long have been making
3 these types of investments and making these
4 types of cost investments, right? Let me
5 rephrase that question.

6 With respect to artist and
7 repertoire investments, this is a type of cost
8 that the sound recording, the record labels
9 have been making for a very long time,
10 correct?

11 A Yes.

12 Q Well before there was ever
13 webcasting?

14 A I think that's correct.

15 Q And none of these A&R investments
16 are accounted for in Universal books and
17 records as being attributed on a line item to
18 webcasting, correct?

19 A Well, most advances are recoupable
20 from any and all monies due the artist. So to
21 the extent that monies flow in from, again, a
22 variety of revenue sources, the artist shares

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1 in those. Therefore, any advances paid or
2 recording costs paid on their behalf are
3 recoupable against any and all monies.

4 Q Well, when they're accounted for
5 on the books, they're not broken out by how
6 they're recouped? It's just general revenue
7 flowing in?

8 A Well, to be specific, on an
9 artist's statement to the extent that there
10 are, again, a variety of revenue sources,
11 those revenue sources on a royalty statement
12 are from the sale of CDs or from, you know,
13 the synchronization or the license of a track,
14 it could be webcasting. All sources of income
15 are denoted on the artist statement and then
16 we show the advances paid to them. And then
17 there's a net amount due the artist or they
18 still owe us money. So those items are denoted
19 on the artist statement.

20 Q But when it rolls up, those don't
21 categorize into different areas, do they?

22 A Not necessarily.

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1 Q You noted in your testimony that
2 there is a difference between A&R expenditure
3 and A&R expense, correct?

4 A Yes.

5 Q And in fact, if you look on page 6
6 of your testimony, A&R expenditure on the
7 label side when you adjust for the recoupment
8 is adjusted downward by hundreds of millions
9 of dollars on the profit and loss statement,
10 correct?

11 A Yes, that's correct.

12 Q If webcasting as we know it
13 disappeared tomorrow, is it likely -- it is
14 likely that Universal would incur the very
15 same A&R costs with respect to artists,
16 correct?

17 A I -- I guess you're asking me a
18 hypothetical?

19 Q Correct.

20 A But again, I -- my -- my response
21 would be as in today's world our business
22 model is changing. We are -- we are seeing and

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1 enjoying many sources of new revenue streams,
2 whether it's from the mobile world, whether
3 it's from the digital world, whether it's from
4 webcasting, whether it's from satellite radio,
5 what have you. So there are a whole host of
6 new revenue streams because of technology and
7 because of the decay of the CD.

8 So it is true to say that
9 potentially webcasting is not necessarily that
10 material to our business today. But all of
11 these revenue sources are ways in which we are
12 recouping the investments that we are making
13 today against, you know, future revenue
14 streams. And, again, people are -- you know,
15 consuming music from a variety of areas. So
16 it is true to say that it is probably not that
17 material today, but I believe in the future it
18 would be material.

19 Q And because it's not a material
20 source of revenue for Universal today, it
21 doesn't affect the up front A&R costs that the
22 company expends on an artist to promote or to

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1 start a new record, correct?

2 A That's a very difficult question
3 to answer, you know, from where I sit today.
4 Because I'm not the person making that
5 decision. I'm not the A&R person that looks at
6 the commercial viability of an artist. It is
7 in the eyes and the ears of the A&R person.

8 When they sign an artist what goes
9 through their head to figure out where they
10 think they're going to sell that -- where
11 they're going to sell that artist, whether
12 they think it's going to be a great digital
13 artist or it's going to be a great urban
14 artist, it's going to sold at the street
15 level, or it's going to be a touring artist I
16 don't know. So I cannot answer that question
17 to say what goes through somebody's mind in
18 terms of where they think they're going to
19 recoup or what the level of investment is
20 going to be.

21 Do I think that they think, oh,
22 I'm going to get webcasting royalties,

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1 therefore I can give them, you know, a
2 fraction more? I don't think that goes their
3 head. But I do think that they think about how
4 revenue is going to be derived from the
5 signing of that artist.

6 Q Can you identify any aspect of A&R
7 costs incurred today that would not be
8 incurred if webcasting stopped today?

9 MR. SMITH: Asked and answered,
10 Your Honor. The exact same question.

11 CHIEF JUDGE SLEDGE: Ms.
12 Rosenstein, are you asking if expenses are
13 made without thoughts of income?

14 MS. ROSENSTEIN: Your Honor, I'm
15 trying to demonstrate that expenses are made
16 regardless of the source of income. And, in
17 fact, the primary source of income is the sale
18 and distribution of the CD, and they would be
19 the same expenses regardless of whether or not
20 there was webcasting.

21 They've had A&R expenses long
22 before there ever was webcasting. And they're

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1 going to continue regardless of whether
2 webcasting continues. It's the type --

3 CHIEF JUDGE SLEDGE: If the income
4 sources don't change?

5 MS. ROSENSTEIN: Well, because
6 they're so primarily focused on the compact
7 disk and the digital download. It doesn't
8 matter whether or not there's webcasting is
9 the point.

10 CHIEF JUDGE SLEDGE: Objection
11 sustained.

12 BY MS. ROSENSTEIN:

13 Q I would like to move on to
14 marketing costs now. I pages 7/8 of your
15 written statement you discussed types of
16 marketing investments that are made "up
17 front," correct?

18 A Yes.

19 Q And the vast majority of marketing
20 promotion expenses are incurred before the
21 record is even for sale, correct?

22 A Generally, yes.

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1 Q And so the vast majority of
2 marketing promotion expenses are incurred in
3 an effort to sell sound recording through a
4 digital download or compact disk, correct?

5 A Or a stream or a master tone, yes.

6 Q But the vast majority of marketing
7 and promotion expenses are spend on the
8 digital download and compact disk, correct?

9 A Most marketing is to develop
10 consumer awareness. It is the tools by which
11 we are going to, hopefully, get public
12 awareness of an artist or a sound recording.

13 Q And you want public awareness to
14 sell the compact disk or digital download,
15 correct?

16 A We -- again, we want to garner
17 revenue from all sources. And in today's
18 world a substantial portion of our revenues
19 come from either a digital download, a master
20 tone, a ring tone or a sale of a compact disk.

21 Q And marketing costs that are
22 incurred before a final product is created

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1 include advances or recording costs associated
2 with the sound recording itself, such as
3 videos, creative services, packaging and photo
4 shoots, correct?

5 A Yes.

6 Q And these types of marketing costs
7 have always been incurred by UMG prior to sale
8 and distribution in the consumer market, even
9 prior to the advent of webcasting, correct?

10 A That is the business we're in,
11 yes.

12 Q Okay. And if webcasting were to
13 disappear tomorrow, UMG would still incur
14 these same types of marketing costs, correct?

15 A I'm not necessary -- again, I -- I
16 go back to my previous answer. A lot of the
17 costs incurred, you know, today in marketing
18 is the outlets are so much more than they were
19 many years ago. Our music is streamed over
20 internet. I walk through my office everyday.
21 People have their computers on. And they're
22 streaming from the internet, from webcasters

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1 our music whether it's our music our other
2 labels.

3 So the internet digital technology
4 has given the consumer greater abilities to
5 retrieve and consume music in a lot of
6 different media. And our marketing efforts
7 will go towards a lot of those areas to get
8 consumer awareness, whether it's creating the
9 video to have it streamed on a computer,
10 giving the video to an MTV to have it played
11 over, you know, a television station or what
12 have you. So a lot of these marketing
13 expenses are incurred, but they are to
14 hopefully get consumer awareness in whatever
15 methodology or media by which a consumer will
16 consume our music and hopefully buy a CD, buy
17 a download, buy a video, you know, in hopes to
18 recover some of the investment.

19 Q Can you identify any aspect of
20 marketing costs such as video, creative
21 services, packaging and photo shoots that
22 would cease if webcasting under statutory

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1 license stopped today for any reason?

2 A I'm not -- I'm not at the level of
3 developing the market plans. So I could not
4 answer that fully. It would probably be more
5 of a marketing person to ask that question in
6 terms of how they direct their marketing. But
7 I really don't know what would or would not go
8 away.

9 Q I'd like to discuss with you how
10 you keep track of marketing expenses.

11 (Whereupon, the document
12 referred to was marked
13 for identification as
14 Services Exhibit R-55.)

15 BY MS. ROSENSTEIN:

16 Q Mr. Ciongoli, I've put in front of
17 you what's been marked as Services Rebuttal
18 Exhibit 55. Can you identify this document,
19 please?

20 A Yes. I believe it is some backup
21 to some of the information that is presented
22 in my -- I guess my rebuttal testimony.

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1 Q And this is a document that you've
2 seen before?

3 A Yes.

4 Q And it was prepared either at your
5 direction or under your supervision?

6 A That is correct.

7 MS. ROSENSTEIN: I'd like to offer
8 Services Rebuttal Exhibit 55 into evidence.

9 CHIEF JUDGE SLEDGE: Any objection
10 to Exhibit 55?

11 MR. SMITH: No, Your Honor. It can
12 be admitted under the protective order,
13 though. It's confidential material that's not
14 to be available to the competitors and the
15 record producers.

16 CHIEF JUDGE SLEDGE: Why is it
17 confidential?

18 MR. SMITH: I'd be happy to ask
19 the witness, Your Honor.

20 VOIR DIRE

21 BY MR. SMITH:

22 Q This document, does this contain

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1 confidential information that your company
2 would seek to keep from being known to our
3 competitors? And if so, why?

4 A Yes. This is highly competitive
5 information. We do not share individual
6 category or our marketing expenses with anyone
7 outside of the company.

8 Q And what would be the consequences
9 if that information were known to the other
10 major record companies, for example?

11 A Again, depending on the level of
12 sales and the level of investment that we make
13 in terms of marketing expenditure, I think
14 that that have, you know, a significant or a
15 severe impact from a competitive standpoint.

16 CHIEF JUDGE SLEDGE: Why do you
17 think your competitors don't know this
18 information?

19 THE WITNESS: This is not publicly
20 available. Our competitors guess at what they
21 think we spend on marketing. They don't know.
22 This document actually has categories of spend

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1 by year as to what we spend on a particular
2 type of expenditure, for example videos,
3 packaging, what have you.

4 If you -- you can derive a lot of
5 statistics from this information. And, again,
6 that would be highly detrimental to our
7 company if our competitors knew that we spent,
8 for example, more or less on video costs than
9 they do. You know, they may be able to go to
10 an artist and say we know that Universal
11 spends on an average X for a video. We'll go
12 ahead, if you sign to our label, we're going
13 to spend Y on your video. And that, again,
14 would put us at a competitive disadvantage.

15 CHIEF JUDGE SLEDGE: Do you know
16 what your competitors are spending in these
17 categories?

18 THE WITNESS: I do not know.

19 CHIEF JUDGE SLEDGE: You do not
20 know at all?

21 THE WITNESS: I can guess from
22 whatever public documents are available. For

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1 example, the Warner Music Group is a public --
2 a publicly traded company. I can get a 10K and
3 look at consolidated marketing. But I have no
4 idea what they spend on their U.S. labels,
5 which is what, this is an aggregation of our
6 U.S. labels. They are a worldwide company.

7 BMI you can probably get publicly
8 the same kind of consolidated information, but
9 necessarily broken out by category for the
10 U.S. labels only.

11 CHIEF JUDGE SLEDGE: To be
12 specific, what is a category and what is --
13 and where is that consolidated in public
14 information?

15 THE WITNESS: If you -- for
16 example, if you go to page -- the second page
17 of this document where you look at, it's
18 called P&L Global Report 20 -- '01/2005 to
19 12/2005, this is for the calendar year 2005.
20 These are the consolidated expenditures by
21 category in terms of trade advertising,
22 consumer advertising, so and so forth that the

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1 U.S. labels spent in 2005. It goes back and
2 supports the previous -- the prior years.

3 That information is not publicly
4 know in any document that I've ever seen from
5 a competitor, whether consolidated or
6 otherwise.

7 CHIEF JUDGE SLEDGE: You didn't
8 hear my question. My question is be specific
9 what in this exhibit is not included in public
10 offerings and to the extent that it's
11 consolidated in public offerings, where is it
12 consolidated?

13 THE WITNESS: The number -- if I
14 understand your question correctly, that would
15 be included in our competitor would be the
16 total number. For example, on the second page
17 of 318 million. That number alone would not be
18 known. It would be consolidated with the
19 worldwide outside of the U.S. rest of world
20 marketing. So there would be even a larger
21 number that would be on a consolidated profit
22 and loss statement attached to a 10K or a 10Q

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1 if it was a public document.

2 CHIEF JUDGE SLEDGE: And that
3 consolidated amount then can be analyzed based
4 on the size of the components of the total
5 organization that is reflected in the
6 consolidated public figures?

7 THE WITNESS: The only -- the only
8 way you can analyze that is, say, aggregate
9 total marketing as a percentage of your sales
10 must equal X. And, yes, you can draw that
11 statistic or that conclusion. To be able to
12 allow a competitor to say the --

13 CHIEF JUDGE SLEDGE: Well let me
14 stop you right there. Do you do that with your
15 competitors?

16 THE WITNESS: We look at aggregate
17 marketing, yes we do.

18 CHIEF JUDGE SLEDGE: And draw a
19 conclusion based on what the units are based
20 on their market share?

21 THE WITNESS: I don't draw it to
22 units. I just look at it -- from again, from

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1 an aggregate perspective what they are
2 spending in terms of aggregate marketing to
3 the total revenue that they derive.

4 I would love to know what they
5 spend on each one of their components, but I
6 don't have access to that information.
7 Because, again, that tells me whether I'm too
8 competitive or less competitive than the
9 market. And if I had access to that
10 information, I believe it would give me a
11 competitive advantage.

12 CHIEF JUDGE SLEDGE: And when you
13 say components you'd like to know, you're
14 referring to each line on page 2 of Exhibit
15 55?

16 THE WITNESS: Yes, Your Honor.

17 CHIEF JUDGE SLEDGE: Any objection
18 to the motion?

19 MS. ROSENSTEIN: No.

20 CHIEF JUDGE SLEDGE: Without
21 objection the motion is granted.

22 I think Mr. Smith interrupted me.

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1 I don't believe I completed the earlier
2 process and the exhibit is admitted.

3 (Whereupon, the document
4 previously marked for
5 identification as
6 Services Exhibit R=55,
7 was received in
8 evidence.)

9 MR. SMITH: I apologize, Your
10 Honor.

11 BY MS. ROSENSTEIN:

12 Q If you look at Services Rebuttal
13 Exhibit 55 with me, page 1 is expanded details
14 that support the market expense line items
15 included on page -- at the bottom of page 7 of
16 your rebuttal statement, correct?

17 A Yes, it does.

18 Q And the total at the bottom of
19 page one, Services Rebuttal Exhibit 55 matches
20 that at the bottom of page 7 of your written
21 testimony, correct?

22 A That is correct.

1 Q And then the next four pages of
2 Services Rebuttal Exhibit 55 which are Bates
3 labeled at the end 6774 through 6778 provide
4 a breakdown of marketing commitment by
5 category, correct?

6 A Yes, that's correct.

7 Q And this is commitment as opposed
8 to an actual spend basis?

9 A That's correct.

10 Q And commitment is essentially
11 synonymous with budget?

12 A For the most part, yes.

13 Q Okay. And therefore if you look
14 at the total amount at the bottom of page 2 of
15 Services Rebuttal Exhibit 55, which is for
16 1/2005 through 12/2005, that number is
17 actually larger than the 2005 actual year to
18 date on page 1 of Services Rebuttal Exhibit
19 55, correct?

20 A Yes, that's correct.

21 Q And the reason for that is it was
22 committed but not necessarily expended?

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1 A There -- if I recall correctly,
2 there was a request for detail by category to
3 support the number that was in my statement.
4 This is a report that is generated in the
5 normal course of business that summarizes
6 those commitments and then there would have to
7 be a reconciliation from this number to the
8 number that is on page 7 and on the front page
9 that takes into account recoupment, it takes
10 into account those commitments that weren't
11 necessarily spent. So there is a
12 reconciliation that has to take -- take place,
13 but these represent the commitment, the budget
14 or the actual amounts actually spent in that
15 year.

16 Q And the costs reflected on
17 Services Rebuttal Exhibit 55 are associated
18 with UMG's U.S. products only, right?

19 A That's correct.

20 Q And those products reflected on
21 Services Rebuttal Exhibit 55 is only CDs,
22 DVDs, ring tones and downloads, right?

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1 A This is all marketing spent in
2 that year by the record labels for a variety
3 of products and services that they may have --
4 they may have spent it on.

5 Q And the products and services that
6 you believe they spent it on, unless when we
7 talked on November 3, 2006, was only CDs,
8 DVDs, ring tones and downloads, correct?

9 MR. SMITH: Your Honor, if we
10 could have a reference to the deposition other
11 than merely a paraphrase to steer the witness?

12 BY MS. ROSENSTEIN:

13 Q If you'll turn with me, Mr.
14 Ciongoli, to page 126 of your deposition,
15 which is Services Rebuttal Exhibit 54?

16 A I'm sorry, what page?

17 Q Page 126, which is at the bottom
18 of page numbered 33 -- I'm sorry. It's the top
19 left corner. I'd like to refer you to lines
20 10 through 18.

21 Have you reviewed the testimony?

22 A Yes, I have.

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1 Q And on November 3, 2006 I asked
2 going back to Exhibit 9, which is actually
3 Services Rebuttal Exhibit 55, which is the
4 marketing detail, Ms. Ryan asked you if the
5 costs reflected on this were associated with
6 UMG U.S. only products and then she listed out
7 as products CDs, DVDs, ring tones and
8 downloads.

9 I then asked you "Are there any
10 other products besides CDs, DVDs, ring tones
11 and downloads for which the market detail
12 reflects expenses?" And your answer was:
13 "Noting that comes to my mind." Do you see
14 that?

15 A Yes.

16 Q Was that a correct statement then?

17 A Then, yes it was.

18 Q And do you dispute that statement
19 today?

20 A I wouldn't necessarily dispute it.
21 Just, again, maybe more of a clarification.
22 If you look at lines 14 and 15, tour support

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1 and promotional tours, although they are
2 associated with a band expenditure for a band
3 to actually go out and tour and promote its
4 CD, it is associated with the CD, but it may
5 have been expenses incurred in moving a band
6 around, not necessarily a direct cost to
7 marketing the CD. So there are, again, it's
8 marketing associated with consumer awareness
9 of the sound recording ultimately sold by, you
10 know -- in today's market by these products.

11 Q "These products" being CDs, DVDs,
12 downloads and ring tones?

13 A Correct.

14 Q Okay. Let's move on to overhead
15 costs, which is pages 8 through 9 of your
16 rebuttal statement. And during your direct
17 testimony this morning you discussed that
18 overhead costs includes staffing and employees
19 such as A&R personnel, marketing personnel,
20 executive oversight and finance, correct?

21 A Yes.

22 Q Does overhead also include

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1 salaries?

2 A Yes, it does.

3 Q Fringe benefits?

4 A Yes, it does.

5 Q Travel and entertainment expenses?

6 A Yes, it does.

7 Q Rent?

8 A Yes.

9 Q Communications?

10 A Yes.

11 Q Office supplies?

12 A Yes.

13 Q And so in overhead is all of the
14 things incidental to housing and employing
15 people, right?

16 A Yes.

17 Q And it's true that the company
18 does not have one group or one person whose
19 particular job is devoted to webcasting,
20 correct?

21 A I don't know that. Again, within
22 -- within the marketing department there may

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1 be a -- there may be a marketing person whose
2 job responsibilities may be to get our videos
3 played on a particular webcaster or what have
4 you. I don't know the particular job duties of
5 all the marketing and all of the people.

6 Q Okay. If you'll turn with me to
7 page 66 of your deposition starting at line 24
8 and going on to page 67 line 4? I asked you
9 if the company or does UMB have any one person
10 or any group of people who are -- whose jobs
11 are devoted to webcasting? And you answered:
12 "Not in particular."

13 I said "What about in general?"
14 And you said "Not specifically." Do you see
15 that?

16 A And again -- oh, sorry.

17 Q Oh, go ahead.

18 A And again, I think it was true
19 then and as I said now, again, I don't know
20 what the specific and/or general job
21 descriptions of a marketing person is today.
22 I do know that our marketing people do focus

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1 on the new technologies, the digital space and
2 what have you. So, you know, as I noted and
3 as I note today there may be somebody's job
4 out there that is or have some portion of
5 their job that focused on webcasting. Clearly
6 there are people who focus on the digital
7 space.

8 Q Meaning digital downloads as well?

9 A I refer to it as the digital
10 space, whether it's ring tones, master tones,
11 streaming, what have you.

12 Q Digital downloads?

13 A That's your word, not mine.

14 Q Universal doesn't try to allocate
15 any overhead costs to webcasting development,
16 though, correct?

17 A That is correct.

18 Q And Universal doesn't try to
19 allocate any overhead costs to webcasting
20 administration?

21 A Not to my knowledge.

22 Q Okay. In fact, if you wanted to

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1 do any type of allocation, you would have to
2 comb the financials and do some sort of study?

3 A Possibly.

4 Q And that's because Universal
5 doesn't measure its business in terms of what
6 it spends on webcasting?

7 A Again, I think you're-- you're
8 singling out just one revenue source. We don't
9 allocate on it a variety of levels.

10 Q You don't allocate it to that one
11 revenue source?

12 A Nor to other revenue sources,
13 either.

14 Q I'd like to now turn your
15 attention -- well, let me back up for a
16 second. You do allocate overhead, though, to
17 A&R?

18 A Yes, we do.

19 Q And you do allocate overhead to
20 certain types of business segments such as
21 finance?

22 A Yes, there are departments within

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1 the company that we do allocate overhead to.
2 But I believe the question was do I allocate
3 my overhead to revenue sources. And the
4 answer is no we don't allocate our revenue,
5 our overhead to revenue sources.

6 Q Is that --

7 A We do allocate it to departments.
8 There are many departments. There's the A&R
9 department, there's the marketing department,
10 you know, so and so forth. But, again,
11 overhead is not allocated to specific revenue
12 sources.

13 Q There's a sales department?

14 A Sales cuts across all -- a lot of
15 revenue sources.

16 Q Not all revenue sources, though?

17 A A lot of revenue sources.

18 Q Okay. And you don't have a
19 webcasting department?

20 A I think you asked that before, and
21 the answer is, no, we don't.

22 Q I'd like to now turn your

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1 attention to Part D of your rebuttal statement
2 on page 9, which is overhead. I'm sorry, which
3 is manufacturing and distribution costs. In
4 the first sentence on page 9 below Part D
5 manufacturing and distribution costs you state
6 "UMG's record labels almost must pay
7 significant manufacturing costs in order to
8 produce the physical product that is sold to
9 the customer." Did I read that correctly?

10 A Yes, you did.

11 Q And my physical product you mean
12 the compact disk, correct?

13 A Compact disk, some vinyl product
14 and some still cassettes. Cassettes are still
15 sold.

16 Q And all of the manufacturing costs
17 for finished goods are incurred before the
18 sale and distribution of that physical
19 product, correct?

20 A Yes.

21 Q And you can think of no
22 manufacturing costs other -- I'm sorry. You

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1 can think of no manufacturing that occur after
2 sale and distribution, correct?

3 A Generally, no, because you need
4 the product to sell. So it usually runs in
5 front of -- it is incidental to the sell. You
6 have to have it so you can make the sale.

7 Q Are there any manufacturing costs
8 related to webcasting?

9 A Manufacturing costs? Probably not.

10 Q Therefore if webcasting were to
11 disappear tomorrow, there are no manufacturing
12 costs that would change based upon that
13 disappearance of that revenue stream?

14 A Well, again, I guess if you want
15 to take it to the extreme, depending on how a
16 webcaster either streams our videos or gets
17 our physical product, whether it's sent to
18 them digitally or they actually take a
19 physical CD and they rip it onto their
20 services, there may be some manufacturing
21 associated with that CD that they use to rip
22 it to put it on their servers that they can

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1 stream it. So in that sense, there may be
2 some manufacturing for that particular CD that
3 went to them. But, again, I can't -- that's
4 why it's very difficult to answer your
5 question in a black and white yes or no.

6 Q And you wouldn't change the number
7 of units that you press based upon the
8 disappearance of webcasting?

9 A Possibly, no.

10 Q Let's now turn to the distribution
11 costs.

12 MS. ROSENSTEIN: I believe I have
13 about 10 or 15 minutes left of questioning and
14 I understand that we usually break at 11:00.
15 Would you care to continue on or --

16 CHIEF JUDGE SLEDGE: Thank you.
17 Please proceed.

18 BY MS. ROSENSTEIN:

19 Q So turning to distribution costs,
20 in the third sentence below Part D on the page
21 9 of your rebuttal statement you state:
22 "Another substantial expense incurred by UMG's

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1 record labels is the cost of distributing
2 their sound recordings to retailers and
3 consumers." Did I read that correctly.

4 A Yes.

5 Q And, obviously, none of the
6 distribution costs of the compact disks and
7 DVDs to retailers and consumers is
8 attributable to webcasting, correct?

9 A Yes.

10 Q The first cost you list on page 10
11 is digitizing sound recordings, correct?

12 A Yes.

13 Q And with respect to digitizing the
14 sound recordings, Universal does this for
15 digital downloads, correct?

16 A We are -- we are -- we digitize
17 our -- as, again, as we move to the digital
18 world with all of the new technologies, our
19 products are being, you know, sold in a
20 variety of ways. So in the digital space you
21 have to have a digital sound recording to be
22 able -- whether it's sold as a download, to be

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1 streamed, to be, you know, played, you know
2 put on people's servers. So this is a
3 precursor to being able to digitize -- or to--
4 to exploit your music in the digital world,
5 whether it is downloads or it's master tones
6 or streaming, what have you. So this is,
7 again, a precursor to that activity.

8 Q And because none of the
9 distribution costs reflected in your written
10 statement relate to webcasting, should
11 webcasting disappear tomorrow none of these
12 distribution costs would change, correct?

13 MR. SMITH: Objection. I think
14 that mischaracterizes the testimony, Your
15 Honor. The premise of the question

16 CHIEF JUDGE SLEDGE: Overruled.

17 THE WITNESS: I believe that the--
18 if I understand your question correctly, the
19 first part of D refers to the manufacturing
20 and distribution of physical products to, if
21 you will, brick and mortar, you know,
22 retailers. I think what we were now just

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1 talking about was the cost of digitization and
2 the cost of digital distribution, those would
3 continue in the future. You know, if we didn't
4 have physical distribution, we would have
5 digital distribution in all of its forms. So
6 those costs would still be incurred in the
7 future.

8 Q Because there are other forms of
9 distribution of a work digitally, such as
10 digital radio and digital downloads which you
11 refer to by another name, can you identify any
12 aspect of these digitization costs that would
13 disappear if webcasting were to go away
14 tomorrow?

15 A Again, if we are building systems
16 and we are building libraries for the future,
17 the revenues that we hopefully -- hopefully
18 will garner from the digital -- the digital
19 space so to speak.

20 Q And you would still incur those
21 costs even if webcasting weren't part of the
22 digital space, right?

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1 A Yes, but again we're hoping that
2 these revenue streams become significant to
3 justify the investment today.

4 Q And the revenue streams include --

5 A A host -- a host of digital
6 activity.

7 Q And so even if webcasting were to
8 disappear tomorrow, you would still hope and
9 still make the investments, correct?

10 CHIEF JUDGE SLEDGE: That question
11 has been answered a number of times to
12 disagree with the answer that you're asking
13 for.

14 MS. ROSENSTEIN: I'll move along.

15 BY MS. ROSENSTEIN:

16 Q I'd like to turn now to the
17 exhibits to the rebuttal statement. Turn with
18 me please to SX Exhibit 29RR. Is this a
19 document that you've seen before?

20 A Yes.

21 Q And you discussed earlier the line
22 under EBIT, E-B-I-T?

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1 A Yes.

2 Q And that stands for earnings
3 before interest and taxes?

4 A Yes.

5 Q And you talked about the relative
6 return on sales, correct?

7 A Yes.

8 Q And you said that the relative
9 return on sales is more positive for the
10 income statement that's reflected on Exhibit
11 29 versus the income statement reflected at SX
12 Exhibit 30RR, correct?

13 A I think that was the reverse.

14 Q I'm sorry. You're correct. The
15 publishing has a greater return on investment
16 to your mind than the sound recording?

17 A It has a greater return on sales
18 as opposed to the recorded music side?

19 A And if you look -- if you just
20 compare the --

21 JUDGE WISNIEWSKI: Just for a
22 second. What year are we talking about here,

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1 Mr. Ciongoli?

2 THE WITNESS: I believe we're
3 referring to just 2005.

4 JUDGE WISNIEWSKI: Thank you.

5 BY MS. ROSENSTEIN:

6 Q On Exhibit 29 if you look at the
7 number EBIT for 2005 actuals and you compare
8 the 2005 EBIT on Exhibit 30RR, the shear
9 dollars reflected on Exhibit 29RR are larger
10 than 30, correct?

11 A Yes, they are.

12 Q And therefore, if one was to
13 measure profitability by the number of dollars
14 that a business makes, then would you agree
15 with me that the record labels under that
16 analysis would be more profitable than
17 publishing?

18 A I think there are many metrics in
19 many ways to look at profitability. I believe,
20 you know, most -- most investment people look
21 at the high rate of return as opposed to shear
22 dollars. Clearly a profit is a profit, and I

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1 don't disagree with you. But I think that yes
2 -- and yes, the record labels from a dollar
3 perspective make more money than the
4 publishing. But I think from a return on
5 investment, return on sales I think there is
6 clearly a higher return from the publishing.
7 Again, and that's due to their cost structure
8 and the way in which that they don't have the
9 risk that the record companies have.

10 Q Would you now look with me on
11 Exhibit 29RR and go down to the line that's
12 "Local licensing external," which is local
13 license income? It's the first entry on, for
14 lack of a better term, the second paragraph.
15 Do you see that?

16 A Yes, I see that.

17 Q Local license income external
18 encompasses all revenues that are not from the
19 sale of a compact disk, correct?

20 A I believe that's true. But I also
21 believe that it includes the -- just so that
22 we're not -- it's not semantics here. For

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1 example if a Now album, which is-- I'm not
2 sure if you now album is. But the Now
3 compilation where a physical CD is sold, we
4 receive our participation from the sale of
5 that CD. That's given to us, you know, as a
6 check and that goes into local licensing.

7 So the derivation of that profit
8 came from -- and is considered to be
9 licensing, but it came from the sale of the
10 CD.

11 Q It also includes the sales from
12 record clubs?

13 A Yes, it does.

14 Q And master use licensing?

15 A Yes, it does.

16 Q And synchronization licensing?

17 A Yes, it does.

18 Q And webcasting?

19 A Yes, it does.

20 Q And radio casting?

21 A Yes, it should.

22 Q Okay. And so you include

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1 webcasting and radiocasting in on your line
2 item on your P&L with sync licensing and
3 master use licensing?

4 A Yes.

5 Q You don't distinguish it anywhere
6 else?

7 A That's correct.

8 Q And you can't tell from this P&L
9 what percentage or amount of that comes from
10 webcasting, correct?

11 A No, you cannot from this
12 statement.

13 Q And is there a report that you can
14 run that would demonstrate the amount of
15 dollars attributable in local license income
16 external to webcasting?

17 A Somewhere when I -- when I receive
18 my checks from SoundExchange it would have you
19 -- those documents are probably resident in
20 the company someplace that made the entry into
21 the general ledger that ultimately will look
22 to these numbers. So somewhere in the company

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1 there is detail as to how much SoundExchange
2 or webcasting money we've received as a result
3 of that.

4 Q So you don't keep track of that as
5 part of your regular business?

6 A Again, I would -- from my
7 perspective at the 30,000 foot level the
8 answer is no. But I have accountants whose
9 jobs and responsibility to track these numbers
10 that probably have some level of detail.

11 Q As you sit here today you can't
12 tell us what percentage, though, goes to
13 webcasting? Whether it's a small percentage
14 or very small percentage?

15 A Other than my own gut feel, no.

16 Q Okay. Is radiocasting
17 simulcasting?

18 A I'm not quite sure of the
19 technical term.

20 Q I referred to webcasting and to
21 radiocasting in my previous question. Do you
22 believe those are two separate things?

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1 A I would -- I would use them one in
2 the same. But, you know, again, I'm not the
3 technical person that could tell you what the
4 difference is.

5 Q In my mind radiocasting would be
6 simulcasting or streaming a set group of
7 products, a set group of songs?

8 A Through the computer, through the
9 internet, yes, I would then probably consider
10 them to be synonymous.

11 Q Okay. Thank you, Mr. Ciongoli.
12 Those are the questions that I have for you
13 currently.

14 CHIEF JUDGE SLEDGE: That was a
15 good estimate, Ms. Rosenstein.

16 We'll recess for ten minutes.

17 (Whereupon, at 11:11 a.m. a recess
18 until 11:25 a.m.)

19 CHIEF JUDGE SLEDGE:

20 Mr. Astle? I'm sorry, did I get
21 your name wrong.

22 MR. KIRBY: I'm sorry. I didn't

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1 hear you. I'm Tom Kirby, Your Honor.

2 CHIEF JUDGE SLEDGE: Kirby, that's
3 correct. That's what I wrote down.

4 MR. KIRBY: All right.

5 I was instructed that I shouldn't
6 presume, so I was waiting until I heard my
7 name.

8 CROSS EXAMINATION

9 BY MR. KIRBY:

10 Q Mr. Ciongoli, I'm Tom Kirby. Glad
11 to meet you, sir.

12 A Likewise.

13 Q If I understood your testimony,
14 you believe the return on investment to the
15 publishing company is higher than the return
16 on investment for the recording industry, is
17 that right, recording company, is that right?

18 A The return on sales as depicted in
19 the exhibits.

20 Q And then you use the term internal
21 investment to ROI, didn't you, you equated
22 this to?

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1 A Yes.

2 Q Okay. And as a matter of fact,
3 you suggested an exhibit we were looking at,
4 that it was a 2 for 1 advantage in terms of
5 the publishing industry, right?

6 A For our company, not necessarily
7 the publishing industry.

8 Q Well, that's something I want to
9 go to. That's right.

10 Now your company all operates
11 under one umbrella, right?

12 A Yes.

13 Q And you have a fair amount of
14 authority, for example, as to how the books
15 are kept?

16 A Yes.

17 Q All right. And my question is
18 this -- you also said the recording industry
19 has less right, right? Excuse me, the
20 publishing industry has less risk than the
21 recording industry?

22 A Yes.

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1 Q All right. Now if the capital
2 markets believe that they could get twice the
3 return on investment with a fraction of the
4 risk by investing in the publishing business
5 rather than the recording industry, there
6 would be stampede of money into the publishing
7 business, wouldn't there?

8 A Potentially.

9 Q And if your company really
10 believed that you could get twice the return
11 on investment with less risk by allocating its
12 funds to the publishing part of the business,
13 there would be a massive reallocation of funds
14 going on within your business, wouldn't there?

15 A Possibly.

16 Q And that's not happening, is it?

17 A There is that happening.

18 Q Right now today?

19 A Yes, there is.

20 Q Could you tell me about that?

21 A You may have read in the press
22 that the Universal Music Group is potentially

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1 -- have approval to acquire the BMG music
2 publishing catalogue, which is a significant
3 investment for the company.

4 Q Yes. And is the anticipation that
5 you're going to get twice the return on
6 investment there than if you spent the money
7 in other ways?

8 A I think it's a unique opportunity
9 for the -- not many music publishing
10 catalogues come up for sale from time-to-time.
11 Part of my job and part of the business is to
12 evaluate, obviously, risk and reward.

13 We would love for many of the
14 copyrights to come up for sale. Unfortunately,
15 they don't because they are very similar to an
16 annuity that comes, you know, from time-to-
17 time. When there are these gems, if you will,
18 that do come for sale from time-to-time, there
19 is a flurry of activity to purchase them
20 because publishing assets are very unique and
21 highly sought after.

22 Q All right. And you anticipate that

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1 the money that you're going to be spending on
2 this is going to reflect the kind of valuation
3 you were placing earlier on the publishing
4 business? Two to one return on investment,
5 less risk?

6 A I don't necessarily -- again, I
7 didn't say two to one. I said it's reflective
8 of that in that one year. But there is a
9 tremendous return on publishing assets.

10 Q And you weren't suggesting that
11 that same return would be necessarily realized
12 by other publishing companies, were you?

13 A Again, I can't speak for other
14 publishing companies.

15 Q So you were just giving me your
16 isolated example, is that right?

17 A That's correct.

18 Q All right. Now, there is a
19 revenue flow in the form of royalties from
20 recording companies to publishing companies,
21 isn't there?

22 A Yes, there is.

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1 Q Substantial, yes?

2 A Again, it is a -- it is a -- the
3 royalties if you're referring to the copyright
4 royalties or the mechanical royalties, yes it
5 is.

6 Q All right. And when those
7 royalties are set both the recording companies
8 and the publishing companies know the
9 historical practice in terms of the
10 promotional activities of the recording
11 companies, is that right?

12 A I'm not quite sure I understand
13 your question.

14 Q Let me ask the question in a
15 different way. The various promotional
16 activities and costs that you've described in
17 your testimony here today, those are known to
18 participants in both the publishing industry
19 and the recording industry, right?

20 A Not necessarily.

21 Q Well, I must not be asking my
22 question right, because I think your answer is

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1 going to be yes eventually.

2 People know the recording
3 industries publish, market their records?

4 A Yes, they know that --

5 Q They know the various things they
6 do to promote their artists and recordings,
7 right?

8 A Yes.

9 Q It's understood that that's going
10 to happen, right?

11 A It is -- it is -- again, depending
12 on the enthusiasm and level of support of
13 artist there is a variety of money spent. But
14 generally speaking everyone knows that if a
15 record company signs an artist, it will in
16 fact promote them.

17 Q Okay. I'm sorry I wasn't getting
18 there neatly, but that's where I wanted to go.

19 And there's that understanding,
20 that shared understanding at the time these
21 royalty levels are being set between the
22 recording industry and the publishing

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1 industry, right?

2 A Again, I -- I guess I'm not sure I
3 understand setting of royalties between the
4 two businesses.

5 Q What is your understanding of how
6 the royalty gets determined?

7 A Well, under -- under the -- I
8 guess under the current statutory law there is
9 an amount of money that is paid for the use --
10 for the license, if you will, the use of the
11 composition.

12 Q And when that amount is being set
13 or that percentage, that per amount --

14 A That per amount, that's correct.

15 Q -- is being set, whether it's done
16 with somebody else making the decision or
17 whether it's done by negotiation, the
18 recording industry's point to all of these
19 activities they undertake to increase the
20 shared value of the recording and the
21 copyright, is that right?

22 A Yes.

1 Q And you would think a rational
2 person would take those factors into account
3 in deciding how much the record company had to
4 pay the publishing industry, right?

5 A Okay. I understand your question.

6 Q So there is a discount here so
7 that in effect the publishing industry through
8 a lower royalty than otherwise, is helping to
9 fund the recording industry's promotional
10 activities, isn't that true?

11 A I -- I disagree with that
12 assertion. I don't -- I don't understand how
13 the publishing company is subsidizing, if you
14 will -- I think that's what you're saying,
15 subsidizing the record company for their
16 investment.

17 Q There's an adjustment in the
18 royalty rate in favor of the recording
19 companies to reflect the fact that they're
20 engaging in all these promotion activities,
21 isn't that true?

22 A I -- I-- don't -- I -- I see that

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1 as completely separate. The -- the-- the
2 amount of money that was determined is
3 determined way back when and by a set -- set
4 of circumstances. And those circumstances were
5 such that they are -- they are a cost factor
6 for a record company and it's a revenue item
7 for a publishing company. To now, I think,
8 would draw the conclusion of saying there's a
9 discount that the publishers are subsidizing
10 a record company by virtue of taking this
11 stated rate over here, I -- I don't subscribe
12 to that theory.

13 Q Okay. But do you know what
14 considerations were taken into account in
15 coming to that rate? I thought you told me
16 that you thought it likely the record company
17 would have emphasized all of its promotional
18 activities when that rate was being set.
19 Didn't you tell me that?

20 A But, again, I wasn't around
21 however long ago when these rates were set.
22 So I don't know what discussions were had.

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1 Q Right. Now, you testified that
2 you didn't know all of the job duties of all
3 of the people at your company. Do you
4 remember that testimony?

5 A Yes, I do.

6 Q Okay. But you've been in the
7 recording business for, what, about 16 years
8 now, is that right?

9 A Yes, I have.

10 Q And how long at UMG?

11 A Sixteen years.

12 Q And you don't remember ever being
13 introduced to someone and being told this
14 person's job is to take care of webcasting, do
15 you?

16 A I've never been introduced to that
17 person.

18 Q And you've met a lot of people in
19 your company over the 16 years, haven't you?

20 A Yes, but I do -- I do know that
21 there is a trend in our company now to hire
22 more internet savvy individuals, both

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1 marketing and sales people, to do certain
2 things as technology is changing.

3 Q But you've never met a person and
4 been told this person's job is to deal with
5 webcasting? I think that's what you told me.

6 MR. SMITH: It's been asked about
7 three times.

8 CHIEF JUDGE SLEDGE: Overruled.
9 He has said that, but then his last answer
10 attempted to back away from it.

11 THE WITNESS: Again, has somebody
12 -- to use your -- use your question,
13 introduced me as --

14 BY MR. KIRBY:

15 Q Let's use my question on that.

16 A Okay. Have I been introduced to
17 Mr. Joe Webcaster? No, I have not.

18 Q All right. One further question
19 in this area. You said well things may be
20 changing. I lost track. You used the word
21 "future" quite a number of times in your
22 testimony, didn't you?

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1 A Yes.

2 Q When is the future?

3 A It could be as much as tomorrow.

4 Q And could it be 50 years from now?

5 A Based on a lot of the industry
6 analyses that I've seen, I think the -- the
7 convergence, if you will, from physical to
8 digital is going to be a lot more rapid than
9 50 years.

10 Q Well let me ask, more rapid than
11 50 you say. Are you certain or is that just
12 your best guess at the moment?

13 A Again, nothing is for certain.

14 Q Right. And you're not a
15 futurologist, are you?

16 A No, I'm not.

17 Q And you didn't provide any
18 quantification of the future in your written
19 testimony, did you?

20 A No, I did not.

21 Q And you didn't provide any in your
22 previous testimony on cross examination, did

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1 you?

2 A No, I did not.

3 Q And you're not qualified by
4 experience or training to tell us when the
5 future is going to come, are you?

6 A Well, I can tell you that as part
7 of my --

8 Q Let me ask a question: Are you
9 qualified by experience and training to tell
10 us when the future is going to come?

11 A Again, what the -- can I tell you
12 if tomorrow will ever be here?

13 Q Well, no, no. Just tell me
14 whether you're qualified by experience and
15 training to tell us when the future is going
16 to come.

17 A I guess I don't understand your
18 definition of the future.

19 Q All right.

20 MR. KIRBY: Your Honor, I think
21 that makes my point, and I'm done.

22 CHIEF JUDGE SLEDGE: All right.

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1 Any questions by MPR?

2 MR. TAYLOR: No, Your Honor.

3 CHIEF JUDGE SLEDGE: Mr. Smith,
4 any further questions?

5 MR. SMITH: Yes, Your Honor.
6 Thank you.

7 REDIRECT EXAMINATION

8 BY MR. SMITH:

9 Q Mr. Ciongoli, you were asked by
10 Ms. Rosenstein whether marketing expenses are
11 associated with four specific products; CDs,
12 DVDs, downloads and ring tones. Do you recall
13 that testimony?

14 A Yes, I do.

15 Q Now can you tell us whether
16 marketing expenses are associated as well with
17 other sources of revenue other than products
18 like those four?

19 A Again, I think I referenced to
20 some of the categories. There are -- marketing
21 expenditures are really to promote the artist,
22 image the artist in hope that you, obviously,

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1 sell the products that we currently sell
2 today.

3 For example if there is commercial
4 viability to a song and the song now wants to
5 be licensed, what have you, you can't directly
6 associate that marketing spend with, say, the
7 license of that track to a television show or
8 to a film or TV. But that marketing was
9 incurred and it is incidental to those -- you
10 know, to those efforts.

11 Q And those marketing efforts affect
12 the amount of revenue that is earned, for
13 example, from licensing royalties by UMG?

14 A Yes.

15 Q Now does the amount of money that
16 UMG receives from webcasting or any other
17 revenue source for that matter affect how much
18 money you have to spend on A&R and marketing
19 and other expenses?

20 A Generally speaking our marketing
21 budgets are set as of percentage of sales, as
22 percentage of revenues.

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1 Q And those revenues include
2 webcasting revenues as well as other licensing
3 revenues?

4 A This is from all sources.O

5 MS. ROSENSTEIN: Objection, Your
6 Honor. Leading.

7 CHIEF JUDGE SLEDGE: Sustained.

8 MR. SMITH: I withdraw the
9 question.

10 BY MR. SMITH:

11 Q What categories of revenue are
12 included in those what you call sales that
13 affect the marketing expenses?

14 A It's all revenues.

15 Q Now Mr. Kirby asked you about the
16 mechanical royalties and whether they reflect
17 the fact that the record companies are the
18 ones that incur all these costs like marketing
19 costs. Do you recall that question?

20 A Yes.

21 Q Let me ask you to assume that
22 that's true and that the mechanicals would be

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1 a lot higher if the custom in the industry
2 were for the promotion and marketing all to be
3 done by the publishing company rather than the
4 record company. Got that assumption in your
5 head?

6 A Yes.

7 Q Now can you think of any reason
8 why a similar criterion shouldn't be applied
9 when it comes to setting the royalty rate for
10 webcasting as opposed to mechanical?

11 MS. ROSENSTEIN: Objection, Your
12 Honor, to the hypothetical question.

13 CHIEF JUDGE SLEDGE: Mr. Smith?

14 MR. SMITH: I'm just following up
15 on the cross examination of Mr. Kirby, Your
16 Honor, who asked him exactly the same
17 question.

18 CHIEF JUDGE SLEDGE: He did and
19 you didn't object to it.

20 The objection is sustained.

21 MR. SMITH: Nothing further, Your
22 Honor.

1 CHIEF JUDGE SLEDGE: Any further
2 questions, Ms. Rosenstein?

3 MS. ROSENSTEIN: No, Your Honor.
4 Thank you.

5 CHIEF JUDGE SLEDGE: Mr. Kirby?

6 MR. KIRBY: No, Your Honor.

7 CHIEF JUDGE SLEDGE: Any questions
8 from the bench?

9 JUDGE WISNIEWSKI: Yes. Mr.
10 Ciongoli, perhaps you can just help me clean
11 up a few labels here in your written
12 testimony.

13 THE WITNESS: Yes, sir.

14 JUDGE WISNIEWSKI: If you look at
15 figure four on page 11 of your written
16 statement, the caption at the top says that
17 what we're looking at here is percentage of
18 the record labels and music publishing total
19 revenues?

20 THE WITNESS: Yes.

21 JUDGE WISNIEWSKI: If you look
22 back on page 10, you'll find that in fact what

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1 we appear to be looking at here more correctly
2 for the record labels is their net sales. If
3 you look at the sentence in the first
4 paragraph.

5 THE WITNESS: I'm -- I'm -- where
6 again are you looking at? I apologize.

7 JUDGE WISNIEWSKI: Page 10 the
8 first paragraph last sentence.

9 THE WITNESS: Okay.

10 JUDGE WISNIEWSKI: Are we looking
11 at net sales is my question?

12 THE WITNESS: We are -- I believe
13 the denominator is net sales, that's correct.

14 JUDGE WISNIEWSKI: Okay. So that
15 in fact we should be comparing net sales here
16 for the record labels to total revenues for
17 the publishing companies?

18 THE WITNESS: Yes, that's correct.

19 JUDGE WISNIEWSKI: Okay. And I
20 understand why that would be the case, but I
21 just want to make sure that we've got these
22 labels correct here.

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1 Then if we go back to figure 3, in
2 fact we would have that same comparison. We
3 would have the label's net sales and the
4 public company's total revenues?

5 THE WITNESS: That's correct.

6 JUDGE WISNIEWSKI: But if we go
7 back to figure 2 what we have is the record
8 label's net sales and the music publishing
9 total publishing income. Should that be the
10 publishing company's total revenue?

11 THE WITNESS: Yes, sir.

12 JUDGE WISNIEWSKI: Okay.

13 THE WITNESS: That's a mistake. I
14 apologize.

15 JUDGE WISNIEWSKI: And finally if
16 we go back to figure 1 we have A&R as a
17 percentage of net revenues for the record
18 label's and for the music publishing
19 companies, which --

20 THE WITNESS: Well, it should be
21 total revenues as well. Total revenues for
22 the music publishing.

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1 JUDGE WISNIEWSKI: And net sales
2 for the --

3 THE WITNESS: Correct.

4 JUDGE WISNIEWSKI: Thank you.

5 THE WITNESS: I apologize for
6 those confusions.

7 JUDGE WISNIEWSKI: Those are all
8 the questions I have.

9 CHIEF JUDGE SLEDGE: Judge
10 Wisniewski?

11 JUDGE ROBERTS: I have no
12 questions.

13 CHIEF JUDGE SLEDGE: Well, thank
14 you, sir. That ends your testimony.

15 THE WITNESS: Thank you.

16 (Whereupon, the witness was
17 excused.)

18 CHIEF JUDGE SLEDGE: All right.
19 We'll recess five minutes.

20 (Whereupon, at 11:43 a.m. a recess
21 until 11:52 a.m.)

22 MR. HANDZO: Good morning.

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1 SoundExchange calls as its next
2 Mr. Roland.

3 Whereupon,

4 THOMAS ROLAND
5 was called a witness by Counsel for
6 SoundExchange, and having been first duly
7 sworn, assumed the witness stand, was examined
8 and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. HANDZO:

11 Q And, sir, for the record would you
12 tell the Court your name?

13 A Thomas Roland.

14 Q And, Mr. Roland, there's a little
15 note up there in front of you, right on the
16 desk, can you identify that for us?

17 A Yes. This is testimony I gave
18 several months ago in this matter.

19 Q Mr. Roland, where are you
20 employed?

21 A Universal Music Group, Santa
22 Monica, California.

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1 Q What is your title there?

2 A I'm the Senior Vice President of
3 Film and Television Music.

4 Q Could you tell the Court what your
5 responsibilities are?

6 A My responsibilities are to manage
7 the department that licenses our reported
8 assets to film, television, advertising, video
9 games, new media.

10 Q How many people are there in that
11 department who work for you?

12 A Twelve people.

13 Q Mr. Roland, do you yourself engage
14 in licensing negotiations for the use of
15 Universal music for movies and television and
16 advertising?

17 A Exclusively advertising now. Most
18 of my duties are administrative and marketing.
19 But I do engage in the actual licensing of
20 recordings to the ad world.

21 Q And over the course of your career
22 how many license agreements in this market do

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1 you think you've negotiated yourself?

2 A I could only guess in the
3 thousands.

4 Q And would that include movies and
5 televisions as well as advertising?

6 A Yes.

7 Q And of the group that works for
8 you now how many of those people are engaged
9 in these licensing negotiations?

10 A Seven including myself.

11 Q Are there specific
12 responsibilities for those seven people?

13 A Yes. We have people dedicated to
14 the various different media. We have two
15 television people, two film people, two
16 advertising people. Some of the -- one of the
17 film persons also does video game licensing.
18 And I have a dedicated pitch person.

19 Q How long have you been employed by
20 UMG?

21 A Coming on six years, and 16 years
22 this February.

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1 Q And have you always been involved
2 in the licensing of rights for movie and
3 television and advertising?

4 A Yes.

5 Q Does your division license all
6 Universal music content or is it only part of
7 it?

8 A The entire catalogue.

9 Q How many license agreements do you
10 think that your group completes in the course
11 of a year?

12 A We complete approximately 12 to
13 15,000 licenses a year.

14 Q That's 12,000 to 15,000?

15 A Somewhere in that range.

16 Q Okay. Now in your written
17 testimony, Mr. Roland, you also indicated that
18 you've worked as a music supervisor on various
19 projects?

20 A Yes.

21 Q Can you explain what's involved in
22 being a music supervisor?

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1 A Music supervisor has several roles
2 on a film project or television project. They
3 are basically the quarterback for all the
4 musical elements that go into a film. They may
5 hire a composer. They'll work directly with
6 the director or producers to choose the
7 musical direction of the project. Often times
8 they'll also clear the music for the project.

9 Q How many projects have you worked
10 on as a music supervisor?

11 A Two projects and one additional
12 projects as a clearance person, above and
13 beyond what I do in my day-to-day at
14 Universal.

15 Q And those two projects that you
16 worked on, what were those?

17 A One was a small independent film
18 entitled "East of A" that I think never saw
19 the light of day. The second was a feature
20 film directed by one of our -- our recording
21 artists, Rob Zombie. It was his last --
22 "Devil's Rejects" was the name of that

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1 project.

2 Q Okay. Now just so that we all
3 have our terminology straight, and am I right
4 that the license for the reproduction of a
5 sound recording and a movie or television or
6 advertising is referred to as master use
7 license?

8 A Yes, it is.

9 Q And a sync license would be the
10 license for the use of the musical work in
11 that context?

12 A Yes.

13 Q Okay. Now, could you tell the
14 judges generally what kinds of considerations
15 go into a decision about how much Universal
16 will charge for the use of a sound recording
17 and a movie or television or advertising?

18 A We -- we -- we weigh many
19 variables when determining our fees for each
20 individual project. Stature of the artist.

21 Prominence of the recording, if it
22 was a hit recording, if it was a deep track on

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1 an album.

2 How the artist views himself. He
3 may not be a hit artist, but he may prize
4 himself in that category. That will drive the
5 fee.

6 In the context of the use itself,
7 how much of the recording is used, what type
8 of scene is the recording being used. If it's
9 just background music in a bar scene, we might
10 get less money than if it were an end title in
11 the film or a main title or if the actors were
12 dancing to it or singing along with the
13 recording.

14 Territory. Is it a worldwide deal,
15 United States only.

16 Term. Is it a perpetual deal, is
17 it a five year deal.

18 Those are the main factors.

19 Q What, the size and scope of the
20 project, does that matter?

21 A The budget of the project, if it's
22 a TV show, we'll get a different amount of

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1 money than a film. Advertising gets a
2 different amount of money from a TV show, et
3 cetera.

4 Q Is it fair to say that there's no
5 such thing as a standard deal in your
6 business?

7 A That's a very fair statement.

8 Q I'm sorry, I didn't catch your --

9 A I'm sorry. I missed -- is there a
10 standard deal in my business?

11 Q Yes.

12 A There's no such thing as a
13 standard deal in my business.

14 Q Has it ever happened that you've
15 licensed the very same sound recording at
16 different prices for different uses?

17 A In the same project?

18 Q Or in different projects?

19 A Oh, absolutely.

20 Q Okay. Now, you indicated earlier
21 that your group completes about 12,000 to
22 15,000 license agreements per year. How many

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1 times is Universal approached about potential
2 licenses in the course of a year?

3 A Anywhere from 75 to 10,000 times.

4 Q Okay. And of the --

5 CHIEF JUDGE SLEDGE: Seventy-five?

6 THE WITNESS: Hundred, I'm sorry.

7 Seventy-five hundred.

8 CHIEF JUDGE SLEDGE: Thank you.

9 BY MR. HANDZO:

10 Q So most of the approaches actually
11 don't result in licenses?

12 A Correct.

13 Q Now, when a -- let's say a movie
14 producer approaches Universal about a
15 potential license, what alternatives to the
16 Universal sound recording does the producer
17 have?

18 A They could re-record the track
19 using the song but using a different version
20 of the song.

21 They could merely have the actors
22 sing the song in the scene, as happens on

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1 occasion.

2 They could use a piece of library
3 score.

4 And what happens quite frequently
5 in television that they could have the
6 composer just simply compose a cue for that
7 scene.

8 Q Okay. Well, let me ask you about,
9 you said that one of the things they can do is
10 have the actor just sing the song. Can you
11 think of an example where that's happened
12 recently?

13 A "Walk the Line", Johnny Cash.
14 Joaquin Phoenix. They sang all of the popular
15 Johnny Cash recording in that -- in that film.

16 Q You also mentioned re-recording.
17 Does it happen that there may be a re-
18 recording of a song recording by the original
19 artist?

20 A Yes. We've encountered quite a bit
21 of the practice of re-recording by hits by the
22 original artists. Village People have

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1 recorded all their hits. Captain and Tenille.
2 Steve Winwood is in the process. And we're
3 also competing with those re-records.

4 Q Does it happen that there are re-
5 record by different artists?

6 A Yes.

7 CHIEF JUDGE SLEDGE: I'm confused
8 by your questions, Mr. Handzo. You're
9 switching back and forth between so many
10 different licenses. When you refer to others
11 singing a song, you're talking about the
12 master use license and when you're referring
13 to the re-recording by the original artist
14 you're referring to no existing copyright but
15 a new copyright being created.

16 MR. HANDZO: Let me see if I can
17 clarify that with the witness, Your Honor, so
18 that the record is clear.

19 BY MR. HANDZO:

20 Q In all of the situations that
21 you've been talking about, Mr. Roland, whether
22 there's a re-recording of a Universal sound

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1 recording by the original artist or a re-
2 recording of the Universal sound recording by
3 a different artist, or whether the actor sings
4 the song; in any of those circumstances does
5 Universal get paid for the use of its sound
6 recording?

7 A No, because there is no use of our
8 sound recordings in those contexts.

9 Q Okay.

10 MR. HANDZO: I don't know if that
11 helps the Court.

12 CHIEF JUDGE SLEDGE: Yes. Thank
13 you. That's what I wasn't hearing, but I
14 didn't hear that to be what your question was.

15 BY MR. HANDZO:

16 Q Mr. Roland, are you familiar with
17 the term cover band?

18 A Yes.

19 Q What is a cover band?

20 A Cover band is a band that records
21 other -- other people's material, other
22 people's popular material. Usually bar bands

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1 Q Is that another option for re-
2 recording?

3 A Yes. Producers have the option to
4 hire a local band or one of their friend's
5 bands to re-record a popular piece of music.

6 Q And, again, if a cover band comes
7 in and re-records a Universal sound recording,
8 is there any sound recording license fee that
9 gets paid to Universal?

10 A No.

11 Q Well, why is it that it might work
12 for a producer of movie or television or
13 advertising to use a re-record or have the
14 actors sing rather than use the original sound
15 recording?

16 MR. STEINTHAL: I'm going to
17 object on foundation grounds.

18 CHIEF JUDGE SLEDGE: Mr. Handzo?

19 MR. HANDZO: Well, for one thing,
20 Your Honor, he's already testified that he has
21 acted as the, you know, the person who
22 acquires the sound recording on several

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1 projects. But I can expand on that background
2 if you want.

3 CHIEF JUDGE SLEDGE: I thought
4 that the question referred to something that
5 just what is job is.

6 MR. STEINTHAL: The question
7 referred to what the person on the other side
8 of the table, why he or she might do something
9 as opposed to why he might does something.

10 CHIEF JUDGE SLEDGE: Is that
11 correct, Mr. Handzo?

12 MR. HANDZO: Well, it is except
13 that he is negotiating with these people. This
14 is what he does for a living is he negotiates
15 with people. So he, obviously, has some
16 understanding of what's going on on the other
17 side of the table.

18 CHIEF JUDGE SLEDGE: Objection
19 sustained.

20 MR. HANDZO: All right.

21 BY MR. HANDZO:

22 Q Mr. Roland, do you have occasion

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1 to discuss with producers and directors why
2 they use the music that they do?

3 A Yes.

4 Q And do you have an understanding
5 from those discussions of what their choices
6 are and what kind of music they select?

7 A Yes.

8 MR. STEINTHAL: I think we're
9 going to get now into hearsay if the next
10 question is what --

11 CHIEF JUDGE SLEDGE: What's wrong
12 with hearsay?

13 MR. STEINTHAL: Well, certainly I
14 don't think it adds to the substance of his --
15 he's not an expert witness who can testify
16 about what he's heard from others and express
17 an opinion about it. We're talking about what
18 he knows or doesn't know.

19 CHIEF JUDGE SLEDGE: Well not
20 withstanding the strong training of lawyers
21 and judges, didn't Congress specifically
22 permit this use of evidence that may be very

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1 foreign to us?

2 MR. STEINTHAL: I'll withdraw the
3 objection.

4 MR. KIRBY: Your Honor, could I
5 make an objection?

6 CHIEF JUDGE SLEDGE: Yes, sir.

7 MR. KIRBY: I object that this is
8 beyond the scope of the written testimony. He
9 wasn't proffered as somebody capable of
10 entering the minds of other people and
11 testifying as to what they were thinking.
12 There's certainly nothing in the
13 qualifications in his direct testimony to
14 suggest that he has that kind of ability. So
15 if they're now trying to qualify him as that
16 kind of witness, I think it's beyond the scope
17 of the written testimony.

18 CHIEF JUDGE SLEDGE: Overruled.

19 BY MR. HANDZO:

20 Q Mr. Roland, based on your years in
21 this business of negotiating licenses and the
22 contacts and conversations that you have with

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1 procedures and directors regarding their
2 choices of what music to use, do you have an
3 understanding of why it is that producers may
4 be able to use re-records or have actors sing
5 a sound recording rather than acquiring the
6 original popular sound recording?

7 A Well, for the most part music is
8 an ancillary part of these projects. I don't
9 go see movies to hear music, generally, unless
10 it's a musical.

11 So they have the luxury of
12 swapping out less expensive options or less
13 popular options to -- to fit the constraints
14 of what is usually a small music budget in the
15 context of the overall production budget.

16 Q And when they use music, are they
17 necessarily using a whole song or could they
18 just be using part of a song?

19 A Well, it depends on the type of
20 project. Usually in advertising it's just a
21 snip-it of the recording, 30 or 60 seconds.
22 Because of the precious real estate in

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1 television of the 20 minute sitcom, they'll
2 generally use a truncated version of a
3 recording. They can't afford to use the 4
4 minute song in 20 minute episode.

5 You'll find full length uses of
6 recordings more in film. But even then, it's
7 still a long time for a viewer to sit through
8 a scene with the music playing unless it's a
9 very prominent use like a major montage scene
10 or, quite frankly, over the end titles where
11 they're going to let the song play through the
12 crawl of the credit.

13 Q Now you indicated earlier that
14 where there is a re-record of a Universal
15 sound recording or the actors sing it,
16 Universal doesn't get paid a license fee for
17 the use of a sound recording. Do you have an
18 understanding of whether the owners of the
19 musical work get a fee in that situation?

20 A They would get a sync license.

21 Q Mr. Roland, when you're
22 negotiating a license and it turns out that

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1 they don't license Universal music, would you
2 necessarily know in every instance where you
3 lost out to a re-record?

4 A Not in every instance. But, you
5 know, we're viewers ourselves and we'll see a
6 scene, perhaps, that we lost to some other
7 reason.

8 Q Are you able to sort of put a
9 number on how often that happens?

10 A It's hard to say. I can't -- I
11 can't put a hard percentage on it. But
12 regardless--

13 CHIEF JUDGE SLEDGE: Mr. Kirby?

14 MR. KIRBY: Well, in light of the
15 answer, I think I'm going to withdraw my
16 objection.

17 BY MR. HANDZO:

18 Q Okay. Regardless of whether or
19 not a study or a producer actually used a re-
20 record, does the potential for them to use a
21 re-record affect your negotiations?

22 A It's entirely affects our

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1 negotiations because the threat of a re-record
2 is always present as part of the negotiation.

3 Q And how does it affect the price
4 that you're able to negotiate?

5 A We don't all the cards in these
6 negotiations. We're subject to, basically, a
7 pie for this scene, which is part of the
8 overall budget of the film. And we're not in
9 the driver's seat for the most part in these
10 negotiations.

11 Q Now you're referred in your
12 testimony to production music and production
13 libraries. Do you recall that?

14 A Yes, sir.

15 Q Can you tell the Judges what a
16 production library is, what production music
17 is?

18 A A production library is -- it's a
19 production house that creates a library of
20 music anywhere from jingles or little clips
21 that can be licensed to regional ad campaigns
22 all the way up to re-records of popular music

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1 or sound alike. These are offered usually in
2 libraries in volumes delineated by genre, year
3 so that a film producer can quickly go through
4 the library and find a cue that might satisfy
5 a particular scene.

6 Q So, for example, if I'm a movie
7 producer and I went to a production library
8 and I said I want something that sounds like
9 '60s music, could I get that.

10 A Yes, you could.

11 Q Or if I wanted something that
12 sounded like a jazz riff by a particular jazz
13 artist, would I probably be able to get that?

14 A Yes, you could.

15 Q Now is production music generally
16 something that sounds a lot like popular sound
17 recordings or might it be something entirely
18 different?

19 A It depends on -- on -- in the
20 context. The sound alike portion of a music
21 library would sound like popular music, and
22 that's the goal of the -- of that particular

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1 type of library.

2 Q Now, do you know who generally
3 owns the rights to those production libraries,
4 production music?

5 A They're usually wholly owned by
6 the entity. The biggest production houses in
7 Hollywood are owned by some of the biggest
8 music publishers.

9 Q That is the people who own the
10 musical works?

11 A Or the new works that are created
12 for -- in these libraries.

13 Q Okay. Now are there reasons why
14 producers might prefer to use production music
15 as does the licensing from Universal?

16 MR. STEINTHAL: Again, I mean I've
17 let things go by. But he's specifically asking
18 about what the producers do. I don't mind him
19 testifying about what he's interacted with
20 producers about. But now we're getting into
21 the mind of producers. And that, to me, is
22 objectionable without foundation.

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1 CHIEF JUDGE SLEDGE: Mr. Handzo.

2 MR. HANDZO: Your Honor, I've
3 already asked him and he has already said that
4 in the course of his career and his
5 negotiations he has discussions with the
6 producers about why they use the music they
7 use and what their options. I think that
8 foundation has already been laid.

9 CHIEF JUDGE SLEDGE: Yes. And your
10 question is do they want, and that question,
11 objection's sustained.

12 BY MR. HANDZO:

13 Q Do you have an understanding, Mr.
14 Roland, about what the advantages or
15 disadvantages might be for a producer of using
16 production music?

17 A There are several advantages in
18 terms of time. It's usually all precleared,
19 pre -- there's only one party that has to be
20 negotiated; that's the owner. Prices are
21 usually very, very low so there's an economic
22 advantage.

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1 So time and money basically.

2 Q Does the availability of
3 production music affect your negotiations for
4 universal sound recordings?

5 A Yes, it does. It's always a
6 possibility for one of our clients to use
7 production music.

8 Q And if production music gets used,
9 is there any sound recording payment to
10 Universal?

11 A No.

12 Q Mr. Roland, on page 9 of your
13 testimony you state that one of the things
14 that influences the negotiations of master use
15 and sync rights is participation by the
16 artist. And can you explain to the Court why
17 the artist has a role? Let's say with respect
18 to the master use license first.

19 A They may have a contractual clause
20 that it gives them the right of refusal for
21 these types of deals. And in cases where they
22 don't have that in their contract, we as a

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1 courtesy grant that to them if they're
2 currently signed to the label.

3 Q Where the artist is both the
4 performer and a songwriter, does the artist
5 have a say in the licensing of both the sound
6 recording and the musical work?

7 A Generally, yes.

8 Q And where that is the case, what
9 does the artist's incentives with respect to
10 which right gets paid more?

11 MR. STEINTHAL: Your Honor, I
12 object on foundation grounds. We're now
13 talking about artists. We're on the verge of
14 getting to a point where I was going to object
15 relating to any of the testimony in here about
16 what publishers do and don't do and what
17 publishers' incentives are. There's no
18 foundation from this witness that he's got any
19 experience in music publishing.

20 CHIEF JUDGE SLEDGE: Question on
21 what are the artist's incentives. The
22 objection is overrule.

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1 THE WITNESS: Can you repeat the
2 question?

3 BY MR. HANDZO:

4 Q Sure. Where the artist is both the
5 performer and the songwriter, what are the
6 artist's incentives with respect to which
7 right gets paid more?

8 MR. STEINTHAL: Your Honor, I just
9 pressed the objection on the grounds that he's
10 not an artist. And the question is about now
11 what is an artist's incentive. So, again, I
12 don't think there's a foundation on that level
13 either.

14 CHIEF JUDGE SLEDGE: Overruled.

15 THE WITNESS: Purely economical.
16 In our deals the splits are 50/50 generally.
17 In our circumstance there is a large advance
18 that may or may not be recouped. The artist
19 won't see any income derived from film or TV
20 licensing until that advance is recouped.

21 On the publishing side the
22 advances are generally much smaller and the

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1 splits with the artists or the songwriter, in
2 this context --

3 CHIEF JUDGE SLEDGE: Mr.
4 Steinthal?

5 MR. STEINTHAL: I move to strike
6 the latter part of his answer that relates to
7 the publishing side for lack of foundation.

8 CHIEF JUDGE SLEDGE: It is beyond
9 the question. I did not address the
10 objection, but it's beyond the question asked.

11 BY MR. HANDZO:

12 Q Mr. Roland, again, in the course
13 of your career and your negotiations over
14 these kinds of rights, have you had occasion
15 to talk with artists and managers about
16 whether they'd prefer to get their money
17 through the sound recording license or through
18 the musical work list?

19 A Yes.

20 Q Can you give us an example of
21 that?

22 A Peter Gabriel is an artist who

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1 often insists on a much larger percentage of
2 the pie for the publishing side than the
3 master use side. These are often marked as a
4 contingent of their approval for our master
5 use.

6 MR. STEINTHAL: Your Honor, I move
7 to strike as being beyond the scope of his
8 written statement. There's no mention of Mr.
9 Gabriel and his incentives.

10 CHIEF JUDGE SLEDGE: Handzo?

11 MR. HANDZO: Your Honor, I'm
12 responding to objections from Mr. Steintal
13 about foundation, and I'm laying the
14 foundation that he's wanted me to lay.

15 CHIEF JUDGE SLEDGE: The objection
16 is that the answer is beyond the scope of his
17 statement.

18 MR. HANDZO: Well, Your Honor, in
19 his statement he does talk about the specific
20 incentives of the artists with respect to
21 where they get their money. So that certainly
22 is in his statement.

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1 CHIEF JUDGE SLEDGE: Where.

2 MR. HANDZO: I believe beginning
3 at page 9, Your Honor.

4 JUDGE ROBERTS: Is it this
5 sentence, Mr. Handzo, in the second paragraph
6 "The artist has a strong incentive to make the
7 publishing as high as possible"?

8 MR. HANDZO: Yes, Your Honor. And
9 then, of course, it goes on from there to
10 describe why.

11 JUDGE ROBERTS: All right.

12 CHIEF JUDGE SLEDGE: Overruled.

13 MR. STEINTHAL: Your Honor, if I
14 may make a different objection then outside
15 the scope, which is if the question is as to
16 the incentive of an artist, that goes directly
17 to the mind-set of an artist.

18 CHIEF JUDGE SLEDGE: No, sir. It
19 goes to the terms of a contract.

20 MR. STEINTHAL: I really question
21 the relevance of having this witness testify
22 about artist's incentives and believe it is

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1 without foundation. But I will, of course,
2 abide by the Court.

3 CHIEF JUDGE SLEDGE: he's the one
4 who negotiates the contracts or a person who
5 negotiates the contracts and the terms of
6 those contracts are within his statement.

7 BY MR. HANDZO:

8 Q Mr. Roland, I apologize because
9 I've sort of now lost a little bit the thread
10 of where we are. But, I think you indicated,
11 but correct me if I'm wrong, that a performer
12 who is also the songwriter may have an
13 incentive to get more money for the musical
14 work than the sound recording, am I --

15 A Yes.

16 Q Yes. Okay. And I think you also
17 indicated that one of the reasons for that may
18 be the way license fees are split?

19 A That's one way, yes.

20 Q Okay. And the license split for
21 the sound recording is what?

22 A Fifty/fifty, generally.

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1 Q And what is the license split for
2 the musical work?

3 A It can vary greatly depending on
4 the type of publishing deal. If this artist is
5 a self-publisher, it could be 100 percent. If
6 it's an admin deal or a subpublishing deal, it
7 could be 80 percent. It fluctuates, but it's
8 much higher than 50 percent.

9 Q And I think you also were at least
10 starting to talk about --

11 MR. STEINTHAL: Your Honor, I rise
12 again. I mean now not only is outside the
13 scope in the specific numbers, but
14 particularly now we're not talking about what
15 somebody said to him in a negotiation. What
16 foundation is there for him to be testifying
17 now about the subject matter of the publishing
18 splits?

19 CHIEF JUDGE SLEDGE: Publishing
20 splits.

21 MR. STEINTHAL: I mean the
22 gentleman has been --

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CHIEF JUDGE SLEDGE: Mr. Handzo?

MR. HANDZO: Your Honor, again, this is a man who makes his living negotiating these deals. He obviously needs to understand what the incentives are of all of the players in the negotiations. And he's already testified that the artists are players in the negotiations because they do get the right to have a say in what deal is done.

And I also was beginning to lay a foundation before Mr. Steinthal objected again to the fact that he actually has had conversations with the artists in precisely this subject.

CHIEF JUDGE SLEDGE: Overruled.

BY MR. HANDZO:

Q I'm not sure whether you finished telling us what the splits were for the --

A I believe I covered it.

Q Did you cover it? Okay.

Q Did you also finish talking about the recoupment issue?

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1 A In our case, record companies pay
2 high advances which we recoup by various means
3 including film and TV licenses. Our advances
4 are generally much higher than a publishing
5 advance. So often the songwriter who happens
6 to be the artist in this case, may see the
7 synchronization side of the deal and not the
8 master side because of the recruit issue.

9 Q Now you've also begin to tell us
10 about a specific example of this situation I
11 think with Peter Gabriel.

12 A Well in that context he controls
13 his own publishing and enjoys 100 percent of
14 that deal. And as part of our approval
15 approach to him, since contractually we need
16 his consent, he can withhold his consent based
17 on our agreeing to accept a less -- a lessor
18 fee than he's receiving on the publishing end.

19 Q Has that happened?

20 A It has happened.

21 Q Mr. Roland, are there situations
22 where Universal chooses not to extract the

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1 highest prices it can for its sound recordings
2 because it has other goals it wants to
3 accomplish?

4 A Yes. Often we view some of these
5 uses as promotional for our emerging artists.

6 Q Okay. What are the situations
7 where there would be some promotional value
8 for Universal?

9 A We -- we weigh many factors.
10 Primarily if the artist's target demographic
11 coincides with the demographic of, say, a hit
12 television show. An artist appealing to 20
13 year olds, we try to target TV shows that
14 appeal to 20 year olds.

15 We also time these promotional
16 marketing pushes to coincide with right up to
17 the release date of a new record. Sort of
18 building up hype before the release of a
19 record.

20 Q In those circumstances where there
21 may be some promotional value, are there
22 circumstances where Universal might accept a

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1 lower fee or waive it's fee?

2 A Yes.

3 Q Do you see the owners of musical
4 works making the same concessions?

5 A No.

6 MR. HANDZO: Thank you, Your
7 Honor. That's all I have.

8 CHIEF JUDGE SLEDGE: Mr.
9 Steinthal, do you want to start your cross or
10 do you want to go ahead and break now?

11 MR. STEINTHAL: I wouldn't mind
12 starting and then -- I think I have something
13 to do in the first ten minutes, and then we
14 can take a break.

15 CHIEF JUDGE SLEDGE: Okay.

16 CROSS EXAMINATION

17 BY MR. STEINTHAL:

18 Q Mr. Roland, you've never been a
19 webcaster, right?

20 A No, sir.

21 Q You never issued licenses to
22 webcasters?

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1 A No.

2 Q You don't have any experience in
3 the webcasting business?

4 A No, sir.

5 Q And yet you express certain
6 opinions in your written testimony that Mr.
7 Handzo did not even ask you about comparing
8 the licensing of webcasting to licensing in
9 the master use and sync market, right?

10 A Correct.

11 MR. STEINTHAL: Your Honor, I'm
12 going to move to strike for lack of
13 foundation. I didn't have a chance to voir
14 dire, but there are several instances in this
15 written statement that Mr. Handzo I think
16 specifically trying to avoid this didn't ask
17 about.

18 There are passage in particular
19 where starting on page 3 there's a section,
20 the difference between master use licensing in
21 film and television and licensing for digital
22 music services. This witness, based on the

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1 last few answers, has no basis for expressing
2 an opinion about the licensing of digital
3 music services.

4 So insofar as -- and I could go
5 through the passages of the statement --

6 CHIEF JUDGE SLEDGE: And you would
7 have to.

8 MR. STEINTHAL: Okay.

9 CHIEF JUDGE SLEDGE: If you ask to
10 strike, you will be asking to strike a line
11 from that statement.

12 MR. STEINTHAL: Okay. Then let's
13 start then with on page 3 there is the first
14 paragraph talking about it's hard to see how
15 one can compare a negotiation in what he does
16 do. It says "It's hard to see how one can
17 compare a negotiation for a snip-it of a
18 single sound recording for background music
19 use in a non-music product with a negotiation
20 for a blanket license for all the record
21 company's full length sound recording for use
22 in music services to be sold or offered

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directly to consumers."

-----So that, for example, is a statement that makes a direct comparison to an area that he's already testified he has no foundation to testify about.

The next sentence, "These differences have a very significant effect on the structure of the negotiations, the comparative bargaining power of record companies, music publishers and producers and the outcomes of such negotiations." That's a reference to negotiations generally to both, I believe, an area that he does have foundation about and an area that he doesn't.

If you then read, again, the next paragraph, the first significant difference --

CHIEF JUDGE SLEDGE: You're not moving to strike the second sentence in that paragraph?

MR. STEINTHAL: I am. There are only two sentences in the paragraph and I --

CHIEF JUDGE SLEDGE: You're saying

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1 it includes what he has foundation for and
2 what he does not --

3 MR. STEINTHAL: He makes the
4 comparison to something he has no foundation
5 about. That's my concern is that he expresses
6 opinions throughout this section contrasting
7 what he has a foundation to testify about with
8 something he has no absolutely no foundation
9 to testify about. And that's why I believe
10 Mr. Handzo didn't ask him any questions about
11 it.

12 And then if you look at section 1
13 of this section. There's an Arabic 1 The
14 Consumer Product. He makes a distinction
15 between the product that he is involved in
16 licensing and the context of licensing where
17 he has no foundation.

18 JUDGE WISNIEWSKI: And where is
19 that?

20 MR. STEINTHAL: The first
21 significant difference is the context in which
22 the licensing occurs and the end product in

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1 which the music will ultimately be used. The
2 difference that he's talking about is the
3 difference between what he does license and
4 what he doesn't license. So any testimony
5 about the so called difference when there's no
6 foundation for his testimony about webcasting
7 and that context has to be stricken for lack
8 of foundation.

9 Plus, he's expressing an opinion
10 about a subject he's got no foundation to
11 express about. And he's here as a fact
12 witness, not somebody to express opinions
13 about differences in negotiating contexts when
14 he has no foundation in particular about the
15 webcasting context.

16 So this entire section, all three
17 paragraphs of this section 1 talk about
18 differences. "The first significant difference
19 is;" the next paragraph "This difference has
20 a significant impact on the licensing itself."
21 He's contrasting. Again, the difference he's
22 trying to draw is between something he's

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1 testified about what he does do for a living
2 and an area that he's already agreed he's got
3 no foundation to testify about, i.e., the
4 webcasting licensing context.

5 And then it becomes crystal clear
6 in the third paragraph of this section 1 when
7 he says "That is vastly different from a
8 digital music service" and goes on and on.

9 So I would move to strike the
10 entirety of this section called "Difference
11 Between Master Use Licensing in Film and
12 Television and Licensing For Digital Music
13 Services" on the basis that he has no
14 foundation for it. Mr. Handzo didn't go there
15 at all, I think the reason that I'm raising
16 right now.

17 CHIEF JUDGE SLEDGE: Please don't
18 repeat yourself, just repeat your motion.

19 MR. STEINTHAL: Okay.

20 JUDGE WISNIEWSKI: Well, there's a
21 question about that. You say the rest of this
22 section, isn't that the entirety of his

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testimony?

MR. STEINTHAL: No. I'll grant him that he does testify in --

JUDGE WISNIEWSKI: I'm just trying to clarify what you're asking.

MR. STEINTHAL: I'm seeking to strike that portion of his testimony that seeks to make a contrast or express an opinion about the difference between what he does --

JUDGE WISNIEWSKI: All right. I understood that.

CHIEF JUDGE SLEDGE: We are just asking you to identify. You identify the part you want struck.

MR. STEINTHAL: Okay. Well, let's proceed. There are going to be some parts I don't --

CHIEF JUDGE SLEDGE: Judge Wisniewski just said what you've identified is the whole testimony. And now you're saying you're not.

MR. STEINTHAL: No. I --

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1 CHIEF JUDGE SLEDGE: Well, you
2 did, too. You said the whole thing under --

3 MR. STEINTHAL: Under section 1.

4 CHIEF JUDGE SLEDGE: No, that's
5 not what you said. So you want only to strike
6 section 1?

7 MR. STEINTHAL: You know, I didn't
8 realize that there was not another caption
9 break. I'm sorry. I thought there was a
10 follow up caption.

11 So section 1 under that caption I
12 would move to strike the entirety of it.

13 Section 2 I would also move to
14 strike the expression of opinions about
15 differences between single and blanket
16 licensing because, again, the focus of his
17 testimony is to draw a contrast to blanket
18 licensing of webcasting, which is a subject
19 about which he has no foundation to testify.

20 And so, I believe that all of
21 section 2 should be stricken on that bases.

22 Section 3 we get into, you know,

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1 different subject matters that I want to
2 examine about after the lunch break.

3 JUDGE ROBERTS: Mr. Steinthal,
4 what expertise do you need to have to know the
5 difference between a license for a single
6 piece of music and a blanket license? I can
7 understand if he was testifying as to the
8 specifics of negotiations for blanket license
9 like prices and terms. But I just don't see
10 where he's offering that type of testimony. I
11 just see where he's offering testimony well
12 there's a blanket license, something that's
13 known as a blanket license and then there's a
14 license for a single piece of music. I don't
15 see where you have to be an expert on blanket
16 licenses.

17 MR. STEINTHAL: Well, you're
18 focusing on section 2, not section 1.

19 JUDGE ROBERTS: Well, it's also in
20 section 1. It's even in the first sentence
21 that you brought up. It's actually the lead
22 in paragraph of section 1.

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MR. STEINTHAL: Right.

JUDGE ROBERTS: Can one compare and negotiation for a snip-it of single sound recording to one for a blanket recording.

MR. STEINTHAL: Well, Judge Roberts, I would submit that he has no basis since he doesn't license on a blanket basis to come here and testify and, frankly, express opinions which he shouldn't be permitted to testify about anyway because he's a fact witness. Express opinions about the difference between what he does do and the licensing in a marketplace context that he doesn't license. They're free to make that argument, Your Honor, in their papers. But they shouldn't be permitted to bring somebody that has no expertise or experience in the licensing on a blanket basis of catalogues, number one, and specifically to webcasting which is exactly what he's trying to draw a distinction to, number two. And testify about how the differences between the one and the

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1 other should be viewed by this panel. I just
2 feel that there's no foundation for it and
3 it's also expressing opinion which is the
4 province of an expert witness and not a fact
5 witness.

6 So I think on both those bases,
7 sections 1 definitely and section 2 even on
8 the blanket versus single, I would submit to
9 you there's no foundation and it's an
10 expression of opinion as well.

11 JUDGE ROBERTS: It's not an
12 expression of opinion as it's as much as it's
13 an expression of experience.

14 MR. STEINTHAL: But he doesn't
15 have the experience.

16 JUDGE ROBERTS: He certainly does
17 in his testimony with respect to individual
18 license.

19 MR. STEINTHAL: Absolutely. I
20 don't -- I'm not --

21 JUDGE ROBERTS: Well, I think I
22 heard you saying he's offering opinion and he

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1 shouldn't be offering opinion on it.

2 MR. STEINTHAL: Well, he's
3 offering opinion about a contrast between one
4 area of licensing and another when he has no
5 foundation for the second. So to me this was
6 a foundation problem and it's an opinion about
7 something that he doesn't do. How can we let
8 somebody that doesn't engage in the licensing
9 to digital services express an opinion about
10 the difference what he does license and the
11 licensing of music to digital music services?

12 I think we run afoul of both
13 foundation requirements and what his role as
14 a fact witness is.

15 So just to be clear, it's sections
16 1 and 2 that I would move to strike on the
17 foundation and expert -- lack of expert --

18 JUDGE ROBERTS: Including the lead
19 paragraph in section 1?

20 MR. STEINTHAL: Yes.

21 CHIEF JUDGE SLEDGE: And that's
22 the end of your motion?

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1 MR. STEINTHAL: On this particular
2 issue, yes.

3 CHIEF JUDGE SLEDGE: Mr. Handzo?

4 MR. HANDZO: Your Honor, a number
5 of things. Just to start with the sour point,
6 certainly Mr. Steintahl's motion sweeps in a
7 lot of things that Mr. Roland says very
8 specifically about the area that he works in.
9 For example, in section 1 he says the
10 producers of movies, television shows and
11 advertisements are not selling music to the
12 public, they are selling the movie or
13 television show and so on.

14 You know, there he's obviously
15 testifying very directly about what is very
16 directly within his work experience. And
17 there are a number of other sentences like
18 that that I could read. So Mr. Steintahl's
19 motion, obviously, number one sweeps far too
20 broadly.

21 Number two, I think it absolutely
22 is within his knowledge to be able to say I

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1 negotiate individual licenses. And he's given
2 some detail, I could certainly elicit more,
3 about how he negotiates those individual
4 licenses and how each one is actually
5 individual and there is no such thing as a
6 standard license, and each one is very fact
7 specific. Now I could go back and ask him the
8 question is that different from negotiating a
9 blanket license. To my mind that was such an
10 obvious point that it's not even worth asking.
11 But I could certainly ask him the question.
12 Obviously, you know, it is different to
13 negotiate individually based on individual
14 circumstances, based on the individual sound
15 recording, the individual use. Obviously, that
16 is a world difference from negotiating a
17 blanket license. And he doesn't need to know
18 about webcasting to know that. He only needs
19 to know his own business, which is how he goes
20 about negotiating these things and how
21 different it would be if somebody called on
22 him to negotiate a blanket license.

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1 I think he's just stating a fact
2 here. He negotiates initially, and that's
3 different from negotiating a blanket license.
4 I don't think it's an opinion. It's a
5 statement of fact, and it's certainly well
6 within his purview to make it.

7 CHIEF JUDGE SLEDGE: We are
8 recessed until 2:00.

9 (Whereupon, at 12:35 p.m. a
10 recess, to reconvene this same day at 2:02
11 p.m.)
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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:20 p.m.

CHIEF JUDGE SLEDGE: On review of the pending motion to strike the paragraph preceding section 1, all of section 1 and all of section 2 that the witness has no foundation to make those statements, the motion is denied.

MR. STEINTHAL: Your Honor, may I make the same motion as to specific sentences, not only where I didn't get an opportunity before the break, but where I didn't even get to that part of the statement that relates to the same subject matter?

CHIEF JUDGE SLEDGE: Mr. Steinthal, I think the candid answer is that I have no authority to keep you from doing that.

MR. STEINTHAL: Okay. Then I would like to specifically, as I volunteered to do before the break, read the specific sentences, not just in the passages we got to

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1 before the break, but in ensuing places within
2 the statement that I believe there to be a
3 total lack of foundation into the record.

4 JUDGE WISNIEWSKI: Are you making
5 a motion with respect to each one specifically
6 or are you making the motion with respect to
7 sentences in the aggregate that you will
8 identify?

9 MR. STEINTHAL: I think I'd better
10 make it as to each one specifically because I
11 don't want -- I feel that there was an
12 overview rather than looking at specific
13 sentences. And that's why I wanted to do this
14 after the break. So --

15 JUDGE WISNIEWSKI: Thank you for
16 that clarification.

17 MR. STEINTHAL: And to be clear
18 that all of these sentences I believe should
19 be stricken because of lack of foundation of
20 the witness in respect of webcasting and
21 because in many respects he's expressing an
22 opinion and not acting as a fact witness.

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1 So, starting on --

2 JUDGE WISNIEWSKI: Mr. Steinthal,
3 would you repeat your basis again?

4 MR. STEINTHAL: Yes. The basis is
5 that insofar as he is testifying about
6 webcasting or making a comparison between what
7 he does do with respect to the licensing of
8 sound recordings and television and motion
9 picture transactions and comparing that to
10 what he believes to be the situation that
11 exists in respect to the licensing of sound
12 recordings to digital music services, my
13 position is that he has no basis to make the
14 comparison because he does not have the
15 foundation to speak of what the circumstances
16 are with respect to the licensing of sound
17 recordings to digital music services.

18 JUDGE WISNIEWSKI: Thank you. I
19 thought I heard you say something subsequent.

20 MR. STEINTHAL: And secondarily, I
21 believe he's also expressing an opinion in
22 many of those instances. And as I read them,

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1 I will identify whether I also believe that it
2 should be stricken because he's expressing an
3 opinion and he's in the position to do so as
4 a fact witness.

5 JUDGE WISNIEWSKI: Are you saying
6 a lay witness can never express an opinion?

7 MR. STEINTHAL: I think that --

8 JUDGE WISNIEWSKI: It would be a
9 surprising position to take.

10 MR. STEINTHAL: Well, I think it
11 depends on the circumstance. And I think when
12 one has a lack of foundation, it makes it even
13 more inappropriate for the witness to be
14 opining about a subject.

15 JUDGE WISNIEWSKI: So you're
16 saying the reason is actually related to your
17 first, not separate.

18 MR. STEINTHAL: It's related.
19 Yes, it's related. But I think it's a separate
20 issue under the law.

21 JUDGE WISNIEWSKI: Thank you.
22 Just trying to be clear.

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1 MR. STEINTHAL: Okay. The first
2 sentence starting on page 3 that I would move
3 to strike is the prefatory paragraph under
4 right proceeding point 1. "As an initial
5 matter it's hard to see how one can compare a
6 negotiation for a snip-it by the single sound
7 recording for background use in a non-user
8 product with a negotiation for a blanket
9 license for all of the record company's full
10 length sound recordings for use in music
11 services to be sold or offered directly to
12 consumers. These differences have a very
13 significant effect on the structure of the
14 negotiations, the comparative bargaining power
15 of record companies, music publishers and the
16 outcomes of such negotiations."

17 And then the first sentence of the
18 following paragraph. "The first significant
19 difference is the context in which the
20 licensing occurs and the end product in which
21 the music will ultimately be used."

22 You know, all these sentences are

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1 making comparisons that include within it a
2 comparison to the licensing of digital
3 webcasting services or the phrase -- the use
4 of the word "difference" is a difference
5 between what he has testified about with
6 knowledge and that market about which we claim
7 he has no foundation to speak.

8 On the same basis the first
9 sentence of the second paragraph under
10 paragraph one. "This difference has a
11 significant impact on the licensing itself."
12 Again, he's making a comparison between one
13 and the other without a foundation for the
14 latter because the word "difference" is there.

15 Then skipping to the last
16 paragraph of section 1 we would press the
17 motion with respect to the entirety of that
18 paragraph for the same reason. HE states
19 "That is vastly different from a digital music
20 service such as webcasting where the consumer
21 -- "

22 JUDGE ROBERTS: We can read it.

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1 MR. STEINTHAL: Okay. So that
2 whole paragraph I would submit is the same and
3 does express an opinion as well.

4 The second aspect or the second
5 place I would refer you to as where we would
6 move to strike on this basis is in paragraph
7 2 under "Single Versus Blanket License." The
8 first sentence "The second significant
9 difference is what is actually being
10 licensed." Again, because of the use of the
11 word "difference" in comparing one versus the
12 other.

13 Skipping to the first sentence of
14 the second paragraph in section 2. "The
15 difference between a blanket license and
16 license for a single work has a huge impact on
17 the negotiation. The dynamics of these two
18 types of negotiations are very different."
19 Again, he's talking about dynamics of two
20 different negotiations, one of which is
21 webcasting, the licensing to webcaster where
22 he has a lack of foundation.

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1 The next sentence that we would
2 move to strike is the last sentence of this
3 section 2 where he states "By contrast that
4 option is not available in the context of
5 music services seeking blanket licenses for
6 large catalogues of sound recordings -- if a
7 music service lacks a large catalogue of
8 important sound recordings, it will
9 dramatically affect the quality of the music
10 service." Same basis.

11 The next sentence we would move to
12 strike is on page 6, Your Honors, the last
13 paragraph of section 3 the first full sentence
14 states "In the context of a blanket license,
15 a digital music service could never afford to
16 re-record the broad array of the popular sound
17 recordings that would be needed to make the
18 service successful, nor is it likely that
19 music fans would want anything other than the
20 famous versions of such recordings." Again,
21 lack of foundation on that sentence.

22 And we turn to page 9 the very

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first two sentences of section 6. The witness states: "One other very significant difference between licenses for digital rights like webcasting and master use licensing is the pivotal role of the artist in the license negotiations and the artist's financial incentive to inflate the publishing right in the licensing of digital rights. With few exceptions the artist does not have a role in the negotiations." Again, lack of foundation to speak of precisely the subject of webcasting, licensing and negotiations.

The next portion that we would move to strike on this basis is on page 10 under paragraph 7 the fourth sentence states: "In contrast licensing sound recordings to a music service such as a webcaster can substitute for other uses of music and, thus, affect revenues of record companies." That, again, there's a lack of foundation for and we would move to strike it.

So those are the passages

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1 specifically within the testimony where having
2 had an opportunity to disaggregate from the
3 sections themselves, we would move to strike.

4 CHIEF JUDGE SLEDGE: Mr. Handoz?

5 MR. HANDZO: Your Honor, with
6 respect to the first two sections, sections 1
7 and 2 notwithstanding that Mr. Steinthal has
8 now gone back through it line-by-line, I
9 understood the Court to have already ruled on
10 that. So I'm going to assume that I don't
11 need to specifically address that.

12 But just generally what I would
13 say is, first of all, I don't think that in
14 these situations the witness is expressing an
15 opinion. I think he's making statements of
16 fact. But even if they were opinions, that
17 certainly is the case that a lay witness can
18 express opinions in areas that he has
19 knowledge of.

20 And the areas that Mr. Steinthal
21 seems to be concerned about are simply areas
22 where the witness is saying look, I negotiate

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individual licenses. You know, negotiating a blank license would be a very different process. He's not even specifically talking about webcasting. He's making the observation about the difference between negotiating an individual license and a blanket license.

And I think in the other statements there that relate more directly to webcasting are things that are common knowledge in any person know, notwithstanding whether they have ever been a webcaster or not. For example, page seven. "I don't know if any music service or the consumers every relies on sound recordings from production libraries." Well, you know, I know that. I don't need to work for a webcaster to know that. I use webcasting services. I know that they offer the original sound recording.

So this is not the kind of testimony that one needs a foundation of having been a webcaster to know.

That's all I have. Thank you.

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1 JUDGE ROBERTS: Mr. Steinthal,
2 have you asked for that sentence to be
3 stricken about the production library on page
4 7.

5 MR. STEINTHAL: On page 7?

6 JUDGE ROBERTS: Top of the page.

7 MR. STEINTHAL: No, I did not.

8 JUDGE ROBERTS: Okay.

9 CHIEF JUDGE SLEDGE: All right.
10 Mr. Kirby?

11 MR. KIRBY: Yes, Your Honor.

12 Well, certainly associating myself
13 with the objection made, I have a more focused
14 objection if I could, which I think is at the
15 heart of the objection. It's just in each of
16 the sentences that were pointed out there's
17 not only a statement that there is a
18 difference, which perhaps this witness
19 arguably may be able to observe, but he
20 evaluates that difference and assigns
21 significance to it.

22 For example, in the introductory

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1 section on page 7 the second sentence after he
2 said there were differences, he says "These
3 differences have a very significant affect."
4 Looking down at the next sentence. "The first
5 significant difference."

6 Now it seems to me that even if
7 this witness is in a position to describe hot
8 dogs because he's had hot dogs, if he's never
9 had a hamburger, he's not in a position to
10 tell us how significant the differences are
11 between hot dogs and hamburgers. He can say
12 this is what a hot dog it like. He may be able
13 to say a hot dog is long and a hamburger is
14 flat. But he can't say that makes a big
15 difference in the eating experience when he's
16 not qualified with respect to hamburgers.

17 I apologize for the crudeness of
18 the analogy, but that's the best I can come up
19 with.

20 so I associate myself with the
21 objection, and particularly with the phrases.
22 And I won't go through them unless the Court

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1 wants me to in each of these sentences where
2 the witness evaluates the significance of the
3 difference. Because having not experienced
4 one of the two things he's comparing, I just
5 don't think he's got the foundation for
6 evaluating the significance of the
7 differences.

8 JUDGE WISNIEWSKI: Mr. Kirby, why
9 couldn't he make a rational inference on the
10 basis of the facts that he has about the hot
11 dog?

12 MR. KIRBY: Because, obviously,
13 there's a question here. But I don't think you
14 can infer how a hamburger tastes if he hasn't
15 had one.

16 JUDGE WISNIEWSKI: I guess my
17 shorthand question is, is it a question of
18 admissability or a question of credibility?

19 MR. KIRBY: It's a question of
20 admissability when he proposes to testify,
21 swears in, promises to tell the truth under
22 penalties of perjury and then say that this

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1 difference, the difference now, has a
2 significant impact. That one of these
3 negotiations happened very differently than
4 the other.

5 It seems to me he can say this
6 characteristic of the negotiations I'm
7 familiar with in the following. But having
8 never experienced the other type of
9 negotiation, I don't see how he can say in the
10 other type of negotiation in which I have no
11 experience, it plays very different. And
12 that's the effect of allowing him to make
13 these kinds of judgments, comparative
14 judgment.

15 So, again, he's welcome to
16 describe the kinds of negotiations he's
17 experienced. He can say how their
18 characteristics play out in those
19 negotiations. But he shouldn't be allowed to
20 say and the difference has a very significant
21 effect on a different kind of negotiation that
22 I've never done.

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1 JUDGE WISNIEWSKI: But you're not
2 disputing that he could make an opinion, or do
3 I hear you actually saying that?

4 MR. KIRBY: I am disputing he has
5 foundation to offer an opinion that's
6 acceptable into evidence having never
7 experienced it, he's in no of a position to
8 offer testimony than I am or then this
9 tribunal is without the aid of lay some
10 foundation with respect to weight. I'm just
11 saying I have never encountered a situation in
12 which a witness has been allowed to say this
13 characteristic makes this situation very
14 different from that situation when he has no
15 foundation with respect to the second.

16 JUDGE WISNIEWSKI: I think I
17 understand what you're saying.

18 CHIEF JUDGE SLEDGE: All right.
19 We'll recess.

20 MR. HANDZO: I'm sorry. Your
21 Honor, could I just respond to that last point
22 since I didn't have an opportunity.

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1 CHIEF JUDGE SLEDGE: All right.
2 We'll come back to order.

3 MR. HANDZO: A different analogy.
4 Okay. I confess I've never played golf in my
5 whole life, but I think I can say that tennis
6 is a very different sport than golf. And the
7 fact that I might be a good tennis player,
8 which by the way I'm not, would say nothing
9 whatsoever about whether I could be a golfer.
10 Because I can look at the game of golf and can
11 see the ball's not moving. When I'm playing
12 tennis, the ball's moving. And I'm, you know,
13 swinging a racket, I'm not swinging a club.
14 They're different. But the fact that I didn't
15 play golf doesn't say anything at all --
16 doesn't limit my ability to say I know this is
17 a different sport. And I know that what I do
18 playing tennis is not going to help me if I
19 try and pick up golf.

20 CHIEF JUDGE SLEDGE: Thank you.
21 We'll be in recess.

22 (Whereupon, at 2:18 p.m. a recess

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1 until 2:27 p.m.)

2 CHIEF JUDGE SLEDGE: Thank you.

3 We'll come to order.

4 After review of the motion, the
5 motion to strike the paragraph preceding
6 section 1, the motion is denied. The grounds
7 asserted goes to the weight of the evidence
8 and not to its admissability.

9 The first section of section 1,
10 the motion is denied. The grounds asserted go
11 to the weight of the evidence and not to its
12 admissability.

13 The first sentence of the second
14 paragraph of section 1 the motion is denied.
15 The witness is directly involved in the
16 licensing and the comparison to blanket
17 licenses as made here is one of very obvious
18 and the grounds go to the weight and not
19 admissability.

20 On page 4 the first full
21 paragraph, which is the last paragraph in
22 section 7, the motion is denied. The witness

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1 has demonstrated sufficient foundation to make
2 the statements asserted and to significant
3 degree specifically involves the licensing,
4 which is his business or his responsibility.

5 The comparison with licensing of
6 sound records for digital music services is
7 one that is relatively obvious and goes to the
8 weight and not to the admissability.

9 The first sentence in section 2 is
10 denied.

11 The first sentence in the next
12 paragraph the difference between a blanket
13 license is denied. The grounds go to the
14 weight of the evidence and not to its
15 admissability.

16 On page 5 the last sentence of the
17 beginning paragraph or the last sentence
18 preceding section 3 the motion denied for the
19 first part of the sentence until the dashes.
20 The statement is one that is obvious,

21 As to the opinion included in the
22 last part of the sentence following the

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1 dashes, the witness has not demonstrated a
2 foundation to be able to make that statement,
3 and the motion is granted.

4 On page 6 the last paragraph
5 preceding section 4 the effect of re-recording
6 an entire repertoire of a major label of tens
7 of thousands of records is one that is
8 obvious, common sense. The motion is denied.

9 Page 9 the first two sentences in
10 section 6 the motion is denied. The
11 information would be readily available to
12 someone working in the position as the
13 witness.

14 Page 10 section 7 the next to last
15 sentence the motion is granted. The witness
16 has not demonstrated sufficient knowledge to
17 make the statement in that sentence.

18 MR. STEINTHAL: I very much want
19 to get to the substance, but I have one more
20 area that I'd like to ask some foundation
21 questions about.

22 BY MR. STEINTHAL:

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1 Q Mr. Roland, you've never been a
2 music publisher, correct?

3 A Correct.

4 Q You've never licensed sync rights?

5 A Not as a publisher, but as a music
6 supervisor I've licensed from a publisher.

7 Q How often have you done that?

8 A I was a music supervisor on two
9 projects.

10 Q One of which never got made,
11 right?

12 A It got made, I don't think it got
13 released.

14 Q And other than the two projects
15 where you were a music supervisor or you
16 supervised other people, you have no
17 experience in the licensing of sync rights?

18 A Correct.

19 MR. STEINTHAL: I would move to
20 strike the following three passages in the
21 statement based on a lack of foundation to
22 express broad views as to what publishers do

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and don't do. Specifically, on page 5 the first full sentence of the possibility of re-recording, the witness makes the statement "The availability of substitutes affects the bargaining power of record companies far more than it affects music publishers in the sync/master use market."

Then the second place that I would move to strike on these grounds is the entirety of section 5 starting on page 7 the first two paragraphs. Rather than reading it into the record, I will just pause and let you all read the first paragraphs starting "In synch and master use licensing" under the caption "The Goals of the Record Company and the Music Publisher."

And then the last portion I would move to strike is one sentence on page 8, the last sentence of the first full paragraph. The paragraph starts "All uses of music and film, television, et cetera." But the last sentence in that paragraph makes the statement

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1 or opinion "The publisher would be indifferent
2 to such value."

3 And as to each of these three
4 pages, I would urge the Panel to view the fact
5 that the witness has a lack of foundation to
6 express broad principles about what publishers
7 do and what their practices are, and note that
8 Universal Music Group has produced someone
9 else from their publishing division in the
10 sense they produced, for example, Mr. Ciongoli
11 today who has responsibility for both records
12 and publishing. If they wanted to have one of
13 their publishing representatives come here and
14 be subject to cross examination about what
15 publishing incentives are or are not, they are
16 perfectly free to put in a witness statement
17 from someone who does publishing for a living.
18 And they choose not to. And I think that to
19 try to get bookstore testimony from a witness
20 that has extremely little, if any, foundation
21 on publishing issues is inappropriate. And I'd
22 move to strike those three passages.

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1 CHIEF JUDGE SLEDGE: Mr. Handzo?

2 MR. HANDZO: Your Honor, first of
3 all as the witness indicated, he has been in
4 the position of actually acquiring, so
5 obviously he has had occasion to deal with the
6 publishers in that regard. But I believe he
7 has also testified, and if I'm mistaken about
8 this I can certainly lay that foundation, that
9 in the course of what he does for a living
10 negotiating back and forth, he's dealing with
11 all of the parties in terms of what the rights
12 are and who is getting what and why they want
13 it and what their goals.

14 And so it's just in the normal
15 course of his business if he's negotiating one
16 side of the transaction, he's dealing with all
17 the players in that market and all of the
18 people who are negotiating. And so he
19 certainly does know a lot about what drives
20 their decisions and why they're trying to get
21 what they're getting.

22 In addition, on page 7 where he

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1 talks specifically there may be many reasons
2 for this, meaning that music publishers try
3 and get the most they can for the sync rights,
4 you know, what is certainly that the publisher
5 does not control all of these other uses of
6 sound recordings and the publisher does
7 nothing but promote the CD. And that's
8 something that he would certainly know
9 directly from being in the record business and
10 working for a record company. So he certainly
11 knows how that works.

12 But more generally, as I said,
13 it's the fact that he is in this business
14 dealing with all of these people all of the
15 time and having to understand what their
16 motives are in order to make his own decisions
17 about licensing.

18 CHIEF JUDGE SLEDGE: All right.
19 Thank you.

20 We'll recess again.

21 (Whereupon, at 2:39 p.m. a recess
22 until 2:44 p.m.)

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CHIEF JUDGE SLEDGE: Thank you.

We return to order.

In view of each of the items in the third motion to strike, the Court finds that in each of these items the statements are made within the context of the work that the witness does and the motion is denied.

BY MR. STEINTHAL:

Q All right. Mr. Roland, now we can talk about the substance of what's in your statement and your testimony this morning.

Now, you mentioned that Universal Music Group issues between 12,000 and 15,000 licenses of sound recordings per year for TV and movie masters, is that right?

A Approximately, yes.

Q And those are all transactions where in fact you do license a Universal sound recording, right?

A Yes.

Q And those are examples of situations where even though producers of the

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1 TV show or movie or commercial may
2 theoretically have options of swapping out, I
3 think was your word this morning, to a cover
4 band or a re-recorded version of a song or
5 production music. In fact, the producer is
6 paying to get a license from Universal for the
7 sound recording, right?

8 A Yes.

9 Q And many instances where you are
10 approached for a license but don't ultimately
11 issue on, I think there were a few thousand of
12 those per year, is that right?

13 A Between 7500 and 10,000.

14 Q Okay.

15 A Approximately.

16 Q Now in those instances is it
17 correct that you cannot quantify what the
18 reason for failing to reach an agreement after
19 initial contact was?

20 A Yes. That's correct.

21 Q It's true, is it not, that in most
22 instances the producer uses another sound

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1 recording from another label, perhaps because
2 they got a better price?

3 A I wouldn't know what.

4 Q But it's true that in most
5 instances where you lose out on a sale after
6 the initial contact is made, the producer in
7 fact uses a sound recording from another
8 label, is that right?

9 A I can't say that that's correct,
10 no.

11 Q You just have no way of
12 quantifying as between the circumstances of a
13 producer choosing another sound recording from
14 another label on the one hand and doing one of
15 the theoretically available alternatives like
16 re-recording or using a cover band was the
17 reason why that Universal lost out on that
18 sale?

19 A We don't quantify the deals that
20 don't come to fruition.

21 Q But you wouldn't dispute with me
22 that in many, many circumstances it's because

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1 the producer gets another sound recording from
2 another label?

3 MR. HANDZO: Objection. He's just
4 testified three times that he doesn't know.

5 CHIEF JUDGE SLEDGE: This is
6 slightly different. Overruled.

7 THE WITNESS: I wouldn't
8 characterize it as "many, many." But
9 certainly it is a factor in why we don't take
10 a deal from request to fruition, that is one
11 of the factors.

12 BY MR. STEINTHAL:

13 Q And you're going to sit here and
14 say you don't have a foundation to say whether
15 the main reason or the main substitute, I
16 should say, for a Universal sound recording
17 after you've been contacted is not another
18 label's sound recording?

19 A That's -- that's one of the
20 factors involved. But the fact that they can
21 make that substitution or they can re-record
22 is always the weight over our heads in these

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situations.

Q My question is very much more specific. It's whether in fact you have a basis. I mean, you've talked about what you do in the market.

A Right.

Q And are you telling us today as you're sitting there that you really don't know that in most instances where your sound recording isn't used the substitute is another label's sound recording as opposed to these theoretical options of re-recording and the like?

CHIEF JUDGE SLEDGE: Mr. Handzo?

MR. HANDZO: Object. It's been asked and answered.

CHIEF JUDGE SLEDGE: Sustained.

BY MR. STEINTHAL:

Q So when you testified earlier this morning about circumstances where you've observed in movies where you had an initial conversation with someone that there was a re-

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1 record or a cover you were just referring to
2 observations you made generally without any
3 ability to give us a sense of how often that
4 occurs?

5 A Correct.

6 Q And I gather you've seen instances
7 where it wasn't that reason, but someone
8 else's sound recording was used, right?

9 A Sure.

10 Q Now, on the subject of re-
11 recording, there are costs to the TV or film
12 producer associated with doing a re-recording,
13 aren't there?

14 A Yes.

15 Q What are those costs?

16 A I would imagine it would have to
17 do with the caliber of the artist they have,
18 could be several hundred dollars up to several
19 thousand dollars.

20 Q And putting aside the cost of the
21 artist, there's studio costs, is there not?

22 A I included that in that category,

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1 sir.

2 Q And what's the highest -- well,
3 let me back up a little bit. In the two
4 projects that you were involved as a
5 supervisor in did you do any re-recording?

6 A No, I don't believe we did.

7 Q Did you hire any cover bands?

8 A No.

9 Q Are you familiar with the fact
10 that when a studio does a re-recording for a
11 movie, it has to pay the scale for AF of M
12 musicians?

13 A Yes.

14 Q Do you know that there are certain
15 minimum fees that have to be paid?

16 A Yes.

17 Q So even if all you're doing is re-
18 recording a 10 second or 60 second piece of a
19 prior song, you have to pay all those
20 minimums, don't you?

21 A Correct.

22 Q As you sit here today you can't

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1 give us what the range is, though, the costs
2 of re-recording?

3 A I'm not quite sure what those AF
4 of M fees are. They fluctuate depending on the
5 artist or the musician.

6 Q Now, there are times when a
7 producer of a TV show or a film specifically
8 doesn't want to use a master because the scene
9 depends that the actor do the singing, is that
10 right?

11 A Correct.

12 Q So the example you gave this
13 morning of the Johnny Cash movie, that was a
14 situation where Joaquin Phoenix who was
15 playing Johnny Cash did all the singing,
16 right?

17 A Correct.

18 Q And Reece Witherspoon did the
19 singing as Mrs. Cash?

20 A Yes.

21 Q And are you aware that film
22 producers often in order to convey a more

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1 genuine and real feeling to a scene don't want
2 to have actors lip-synching as opposed to
3 doing the singing themselves?

4 A I would imagine that would be a
5 creative decision that they might make.

6 Q And are you familiar generally
7 speaking with the kind of money that a Joaquin
8 Phoenix or a Reece Witherspoon earns in the
9 context of acting in a movie like that?

10 A I have a general idea.

11 Q We're talking millions of dollars,
12 correct?

13 A Yes. Yes.

14 Q And so the actual costs in paying
15 for the recording of the music in that movie
16 is part of what the producer is paying for and
17 the millions of dollars that they're paying
18 Reece Witherspoon and Joaquin Phoenix, right?

19 A I don't know if the music
20 performance is part of their acting fee, but--
21 or a separate thing.

22 Q You're agree with me that in that

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context of the example you gave of that movie,
that's an instance where use of the musical
work was more important to the film producer
than Johnny Cash's prior recording of it,
right?

A In that context it would appear
so.

Q Now, are you aware of the fact
that in the study of master use and sync
licenses that Dr. Jaffe, the expert for the
webcasters, performed in connection with a
prior CARP proceeding in this proceeding, that
re-record situations were excluded from the
study?

A No, I was not aware.

Q Are you aware of the fact that
situations in which cover bands were used were
excluded from the study?

A I was not aware.

Q Are you aware of the fact that
production library situations were excluded
from the study?

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1 A I was not aware.

2 Q Now, it's true is it not, and I
3 believe you state on page 5 of your written
4 statement in the second paragraph on the
5 possibility of re-recording, it's true is it
6 not that the producer of a film or TV show has
7 many choices of musical works to choose from
8 in connection with making a movie or a TV
9 show?

10 A That's true.

11 Q It's true, is it not, that there
12 are literally millions of musical works out
13 there that producer may wish to choose from
14 for use in a movie or TV show?

15 A I would imagine.

16 Q Now, if I understand the bottom
17 line of your testimony about the ability that
18 a producer has to re-record a prior sound
19 recording or to use a cover bank or a
20 production library, the gist of your testimony
21 is that widens the choice of substitutes for
22 the producer in relation to sound recordings

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1 a bit more than the ability to substitute for
2 musical works?

3 A Yes.

4 Q So really what you're talking
5 about is instead of having millions of
6 different alternatives to choose from as in
7 the case for musical works, when it comes to
8 sound recordings there are millions plus the
9 ability to re-record or do a cover band,
10 right?

11 A Well, I disagree. There are
12 millions of sound recordings available. But if
13 a producer or a director is looking for "Sweet
14 Home Alabama," there's only one song and there
15 may be only five versions of that in
16 existence. So there aren't millions of
17 choices if that's what he wants. If his film
18 or her film is set in the late '50s and he or
19 she is looking for a period piece, the
20 available choice diminishes greatly. So --

21 Q It's true, is it not, and you're
22 familiar with the circumstance where producers

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1 actually want a specific sound recording for
2 a scene?

3 A Absolutely.

4 Q And so in that situation you do
5 have much more bargaining leverage as the
6 licensure of sound recordings than you do in
7 a situation where you perceive the producer
8 has more alternatives, right?

9 A If -- if the fees can be worked on
10 both sides, we -- you know, will try to make
11 the deal. But otherwise we're still sort of --
12 the burden of clearing the publishing is
13 always -- is always in the forefront in these
14 negotiations.

15 Q Well, the burden of clearing the
16 publishing is always in the forefront you say.
17 Well, my question was very specific as to a
18 circumstance where you perceive that the
19 producer wants a specific performance of a
20 sound recording, like a Frank Sinatra
21 rendition of something for a given scene. And
22 there are times when you perceive that, right?

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1 A Correct.

2 Q And in that situation don't you
3 feel like you have more bargaining leverage
4 than you do in the circumstance where you feel
5 that the producer has a multitude of different
6 sound recordings that can do the same job?

7 A That's true. But our bargaining
8 power is limited to how the publisher is going
9 to proceed with that negotiation.

10 Q I'm trying to follow where the one
11 comes from the other. Why is your bargaining
12 leverage in the situation where you know the
13 producer really wants that Frank Sinatra song
14 somehow constrained by what the music
15 publisher is going to see for the underlying
16 musical work?

17 A Because ultimately if the fees are
18 too high, despite what his original intent was
19 he will choose another version. It happens all
20 -- quite often.

21 Q That's the entirety of your answer
22 to that question?

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1 A Yes.

2 Q Let me go to your witness
3 statement. Let me refer to page 1, I guess it
4 is. Yes, page 1.

5 In the first sentence of the
6 overview section you say "I am providing this
7 rebuttal testimony to the Copyright Royalty
8 Board in response to arguments made by
9 webcasters that the Board should use the
10 market for master use licenses and
11 synchronization licenses as a basis for
12 setting rates for the use of sound recordings
13 and webcasting."

14 What's the basis for your saying
15 that the webcasters have urged the Board to
16 use the market for master use licenses and
17 synchronization licenses as a basis for
18 setting rates?

19 A It's what -- it's what I was told
20 by my attorney.

21 Q Told by whom?

22 A My lawyers, my people I work with.

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1 Q Did you do any review or analysis
2 of Dr. Jaffe's testimony?

3 A No.

4 Q And that would include in this
5 case or the prior CARP case?

6 A Correct.

7 Q I want to go to some actual
8 licensing documents that we've gotten from
9 Universal or SoundExchange during the course
10 of these proceedings to ask you a few
11 questions.

12 (Whereupon, the document
13 referred to was marked
14 for identification as
15 Services Exhibit R-56.)

16 BY MR. STEINTHAL:

17 Q I'm going to show you five
18 different documents, put them all in front of
19 you at the same time just to speak it up a
20 little bit.

21 The first document I'm going to
22 show you, which is Services Rebuttal Exhibit

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1 56 will be documents pertaining to the
2 licensing of the James Brown sound recording
3 "Pappa's Got a Brand New Bag" in the context
4 of the movie "Guess Who." It bears the Bates
5 stamp numbers Services Rebuttal Exhibit 107310
6 through 107312.

7 (Whereupon, the document
8 referred to was marked
9 for identification as
10 Services Exhibit R-57.)

MR. STEINTHAL:

11 Q The next is another film license
12 documentation relating to the same movie
13 "Guess Who" to a different song, "Pappa don't
14 Take No Mess," another James Brown song. It
15 bears the Bates stamp number SX Rebuttal
16 107250 to 107259. And that was Services
17 Rebuttal Exhibit 57.

18 (Whereupon, the document
19 referred to was marked
20 for identification as
21 Services Exhibit R-58.)
22

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BY MR. STEINTHAL:

Q We go to Services Rebuttal Exhibit 58 is a set of documents relating to the licensing of a sound recording called "Pappa Was a Rolling Stone" in relation to the movie -- I don't know how to pronounce it, Gothica. It bears the Bates stamp number SX Rebuttal 106208 to 106213.

(Whereupon, the document referred to was marked for identification as Services Exhibit R-59.)

BY MR. STEINTHAL:

Q The next exhibit R-59 relates to the motion picture "All That Glitters" and the licensing of a sound recording called "That Girl" by Stevie Wonder. Bears the Bates stamp numbers SX Rebuttal 105528 to 105533.

(Whereupon, the document referred to was marked for identification as Services Exhibit R-60.)

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BY MR. STEINTHAL:

Q And the last of the movie or TV show -- actually the movie licenses I'm going to ask you look at relates to the motion picture "Goodbye Love," and it involves the master recording "I Feel Good" by James Brown. It bears the Bates stamp number SX Rebuttal 106105, 106126 to 106129 and then 106135 to 106141.

Okay. And the last of the five is from the movie "Goodbye Love" for the composition -- no we just did that.

All right. If you got a chance while I'm been passing out to purview generally, these documents Exhibits 56, 57, 58, 59 and 60? I will represent to you that all of the references to the SX Rebuttal numbers mean that they were produced by SoundExchange in discovery during the course of the case.

A Okay.

Q And as you're reviewing the

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1 documents, my first question is whether you
2 can identify these as transaction documents
3 from Universal Music Group in relation to
4 various movie sync and master use licenses?

5 A All but one. This one dated '98
6 preceded our merger with Polygram. So this
7 document from Polygram, at the time they were
8 not part of Universal Music Group. That's the
9 thick one.

10 Q Which?

11 A 106105, Exhibit 60.

12 Q Okay. So the one from the film
13 "Goodbye Lover"?

14 A Yes, sir.

15 Q Is from Polygram?

16 MR. STEINTHAL: Let me move into
17 evidence then Exhibits 56, 57, 58 and 59.

18 CHIEF JUDGE SLEDGE: Any objection
19 to Exhibits 56, 57, 58 and 59?

20 MR. HANDZO: No, Your Honor.

21 CHIEF JUDGE SLEDGE: No objection.
22 They're admitted.

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1 (Whereupon, the
2 documents previously
3 marked for
4 identification as
5 Services Exhibits R-56
6 through R-59, were
7 received in evidence.)

8 MR. HANDZO: Your Honor, I would,
9 however, move to apply the provisions of the
10 protective order to these agreements. These
11 and similar licenses are sensitive in terms of
12 how Universal does license its music and what
13 prices it charges.

14 CHIEF JUDGE SLEDGE: We'll recess
15 just a few minutes.

16 (Whereupon, at 3:07 p.m. a recess
17 until 3:11 p.m.)

18 CHIEF JUDGE SLEDGE: We'll come to
19 order.

20 The witness has stated that every
21 agreement is unique and different and there is
22 no standard agreement. However, to see the

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1 competitive confidentiality of a price under
2 those circumstances, but given the slight
3 possibility that a price in one instance may
4 affect under a far stretch of imagination
5 negotiation in a future proposal, and the fact
6 that there's no objection, the motion is
7 granted.

8 MR. HANDZO: Thank you.

9 BY MR. STEINTHAL:

10 Q Okay. Let's go on.

11 Please turn to Exhibit 56. This
12 is the license with respect to "Pappa's Got A
13 Brand New Bag" by James Brown in the movie
14 "Guess Who," is that correct?

15 A Yes, sir.

16 Q First of all, do you know whose
17 handwriting that is in the top part of the
18 page?

19 A I can only make an inference that
20 it's Don Terbush's handwriting on him signing
21 it, but I don't recognize it offhand.

22 Q Okay. Who is Don Terbush?

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1 A Don Terbush is our Vice President.
2 He works directly for me on film and TV music.

3 Q Now do these documents comprise
4 some of the documentation relevant to the
5 licensing of the James Brown sound recording
6 "Pappa's Got A Brand New Bag" in the movie
7 "Guess Who"?

8 A Yes, they do. There's only one
9 document here that I see.

10 Q And is Mr. Brown considered a
11 major recording artist?

12 A Yes, he is.

13 Q Take a look on the first page of
14 this exhibit the very bottom there's a
15 category or a couple of words that says
16 "Requested rights:"

17 A Yes.

18 Q And then there's a blank next to a
19 dollar sign?

20 A Yes.

21 Q And then it sets forth what the
22 rights are associated with the transaction?

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1 A Yes.

2 Q What is the blank, and can you
3 describe why it is blank to begin with?

4 A Well, I can't really speak to the
5 document since it originated with Sonny
6 Picture Studies, but I can make an assumption
7 that they want us to firm a price or this is
8 the missing piece of this puzzle is the price.
9 He's got all the other deal terms laid out.

10 Q It is a fair statement that often
11 what happens in the back and forth is that the
12 producer gives you the details of the use that
13 they would like to make and says in essence to
14 you or your staff what would you quote for our
15 use of this particular sound recording in the
16 movie in the manner that we've requested?

17 A Yes.

18 Q And is it a fair statement that
19 often they'll send you a document leaving open
20 the space with the dollar sign so that you can
21 then communicate back, meaning you or your
22 staff communicate back, filling in the blank

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1 with what you are quote is for the use?

2 A Yes. Can I correct something I
3 said earlier?

4 Q Sure.

5 A Since there's two Dons on this
6 document. My inference would have to be that
7 this handwriting is Don Kennedy's from Sonny
8 after reading this. My apologies.

9 And so did I answer your last
10 question?

11 Q I think you did.

12 A Okay.

13 Q Is it a fair inference from
14 looking at this document to conclude that
15 after Sonny Pictures requested a quote for the
16 use of "Pappa's Got A Brand New Bag" in the
17 movie "Guess Who" someone on your staff sent
18 back to Sonny the number set forth in the
19 blank here? I'm only doing it that way to
20 avoid having to go into close sessions since
21 the document is restricted?

22 A Yes. However, in this case a fee

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1 was suggested prior to us responding to a
2 blank request.

3 Q Okay. So Mr. Kennedy or someone
4 from Sonny basically asked you to do your best
5 to clear the use for the number that is set
6 forth in both the handwriting on the top page
7 and in the open part of "Requested rights:"

8 A That's what this appears to be,
9 yes.

10 Q And it says right next to the
11 number, does that handwriting say "MFN with
12 publisher"?

13 A That's what it looks to say, yes.

14 Q What's the meaning of the phrase
15 to you MFN with publisher?

16 A MFN stands for most favored
17 nations, which we use to mean a parity in the
18 fee with whatever the publisher is going to
19 charge.

20 Q Is that a normal request of
21 Universal that when they're licensing master
22 use rights in connection with movies and TV

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1 shows to request an MFN against whatever the
2 publishers receive for their sync rights?

3 A It's not a normal request. We use
4 it for various reasons.

5 Q It's a common request, though,
6 isn't it?

7 A We use it sporadically, we use it
8 commonly depending on the circumstance. Each
9 deal is unique in and of itself.

10 Q Let me ask you to look then at
11 Services Rebuttal Exhibit 57. This is a
12 different James Brown track being licensed in
13 the film "Guess Who," is it not? That's the
14 subject of Exhibit 57?

15 A Yes.

16 Q And if you look at the next to
17 licensing terms on the first page, it has a --
18 well, it seems to have been an underscored
19 part of the document. And then the amount of
20 the fee with a parenthetical around "most
21 favored nations basis with the music
22 publisher," do you see that?

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1 A Yes, I do.

2 Q And is that something that
3 Universal or you or someone on your staff
4 would have gotten back to Sonny Pictures and
5 disclosed to them what your quote is for this
6 track?

7 A Yes.

8 Q Now you mentioned that the use of
9 MFN clauses is common in some circumstances,
10 I think was your statement. Why is it common
11 in some circumstances?

12 A Well in the circumstances of the
13 prior document, Exhibit 56, because he's
14 asking for a rush clearance. He's also
15 offering a fee. I can only speculate since I
16 didn't do this deal, that Mr. Terbush was
17 basically, I don't know if there may have been
18 a phone call associated with this where Mr.
19 Kennedy suggested that a publisher had already
20 agreed to the fee, that Mr. Terbush was
21 basically ensuring that we were going to get
22 the most amount of money possible in the

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1 circumstance.

2 Q And one way of doing that is to
3 make sure you get no less than what the
4 publisher gets?

5 A That is one way, yes.

6 Q And that's the reason for asking
7 for MFN, is it not?

8 A Well, yes and sometimes artists
9 request it that we insist on it.

10 Q Turn if you will to --

11 JUDGE ROBERTS: Mr. Roland, could
12 you explain to us on the licensing terms what
13 it means when it says including a worldwide
14 buy out and that language there?

15 THE WITNESS: Are you looking at
16 Exhibit 57, Your Honor?

17 JUDGE ROBERTS: That seems to be
18 in both 56 and 57.

19 THE WITNESS: Okay. Again, this
20 is a Sonny Pictures document, but I can
21 speculate that -- well, I'll tell you what our
22 interpretation is. That in a film license

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1 they always request worldwide rights --

2 JUDGE ROBERTS: Okay.

3 THE WITNESS: -- in perpetuity.

4 Broad rights refers to in our business so that
5 they don't have to spell out TV, basic cable,
6 satellite TV, refers to all rights a film
7 would normally be exhibited, theatrical,
8 foreign theatrical, foreign television
9 including home video.

10 JUDGE ROBERTS: That part I know.
11 But what about this "all forms of audiovisual
12 devices intended primarily for home use"?

13 THE WITNESS: I'm guessing that
14 Sonny's for a DVD or a home video cassette.

15 JUDGE ROBERTS: Okay.

16 THE WITNESS: I mean, we have our
17 own pet language for a device or format you
18 can purchase and view at home.

19 JUDGE ROBERTS: All right.

20 THE WITNESS: It's their language,
21 Your Honor.

22 JUDGE ROBERTS: Okay.

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BY MR. STEINTHAL:

Q And you would expect that Sonny when it's getting a certain grant of rights for the sound recording, gets a comparable grant of rights for the underlying musical work, correct?

A The underlying grant of rights, yes.

Q Okay. Let's look at Exhibit 58 if we can for a minute. Does this appear to you to be some documentation with respect to a master use license issued for the sound recording "Pappa Was A Rolling Stone" as performed by the Temptations in the movie "Gothica"?

A I don't know if this is part of an actual deal that happened. This is certainly a request for the use of the recording in a film.

Q And if you look at page 106211 it approved as noted, does that suggest -- and it has Mr. Terbush's signature line there. Does

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1 that suggest to you that from the Universal
2 perspective it was approved?

3 A Yes, it does.

4 Q Now, the Temptations are a major
5 performing group, are they not?

6 A We consider them a classic
7 performing group.

8 Q Okay. Within the Motown genre?

9 A Absolutely.

10 Q And within a genre they are a very
11 major act, are they not?

12 A Yes, they are.

13 Q And the track "Pappa Was A Rolling
14 Stone" is a very popular track, is it not?

15 A Yes, it is.

16 Q Now, again at the top of the page
17 in handwriting there is a number that reflects
18 the license fee. And it says "MFN with
19 publishing."

20 A Right.

21 Q Or "MFN with pub."

22 A Yes.

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1 Q Is that a reference to the same
2 kind of MFN against publishing that you
3 testified about just a few minutes ago?

4 A I would guess it is, yes.

5 Q Let me ask you to look at what we
6 marked as Exhibit 59. Does this appear to you
7 to be some of the licensing documents with
8 respect to the master use license issued for
9 the song "That Girl" as performed by Stevie
10 Wonder for the movie "All that Glitters."

11 A Again these are documents, I don't
12 know if a license was ultimately issued based
13 on what you've given me here. But, yes.

14 Q And the handwritten note on the
15 bottom of the first page "MFN with publisher,"
16 is that again the same kind of notation about
17 what you testified previously as to these
18 other agreements?

19 A Yes.

20 Q And Stevie Wonder, is he
21 considered a major performing artist?

22 A Yes, he is.

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1 Q And is "That Girl" a well-known
2 track as song by Stevie Wonder?

3 A Yes.

4 Q Turn if you would, to page 105531
5 of this exhibit. And look at the middle of
6 the page. Does it appear that next to rights
7 fee there is a figure, which is \$2500 less
8 than the first page of the document indicates.
9 And then at the bottom of the page there's
10 some handwriting next to dates.

11 A Yes.

12 Q 4/17 and 4/23, do you see those
13 dates?

14 A Yes, I do.

15 Q Do you know whose handwriting that
16 is, by any chance?

17 A I do not.

18 Q You see that in the 4/17 entry it
19 says "Once publishing approval can quote."
20 Based on your experience can you infer what
21 that's a reference to?

22 A Based on my experience John Paul,

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1 who is Stevie Wonders' manager, they always
2 insist on favored nations on anytime we quote
3 on a Stevie Wonder master. So I'm inferring
4 that that is a reference, perhaps a phone
5 conversation with Mr. Lapinski and John Paul
6 Rosa that once he's been informed what the
7 publisher is getting, that we can go ahead and
8 give our quote.

9 Q And do you see next to 4/23
10 there's "Allison pub quoting" and then there's
11 a figure that's \$2,000 higher than the figure
12 initially typed in under rights and fees?

13 A Yes. Yes, I see that.

14 Q Can you infer from looking at
15 these documents that, in fact, what happened
16 is that Universal quoted a fee, an initial fee
17 as set forth on page 105541 but that as a
18 consequence of the facts that the publisher
19 was \$2,000 more, Universal the sound recording
20 company then got a bump up in the sound
21 recording fee?

22 A No. This -- this was not a quote.

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1 This was a request to the artist. The quote
2 comes on the front page.

3 So this was a request to Mr. Rosa
4 clearing the track at 30,000 most favored
5 nations.

6 Q You don't know whether the reason
7 why the price on the first page, which is
8 \$2500 higher than on page 105531 was a
9 consequence of the publisher quoting a higher
10 fee than Universal did originally?

11 A I can only infer based on my
12 knowledge of Stevie Wonders' habits are in
13 these circumstances?

14 Q Can you infer that happened here?

15 A Yes, based on these notes.

16 Q And does that happen from time-to-
17 time where in fact Universal as a sound
18 recording company does benefit from the fact
19 that there is an MFN against publishing and
20 that the sound recording fee gets bumped up?

21 A It happens on occasions and the
22 alternate also happens where we're asked to

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1 lower our fee because the publisher has a
2 favored nations and it's a higher fee than
3 ours, and we have to accept the lower fee.

4 Q Wait a minute. The most favored
5 nations clause that you ask for is such that
6 if the publisher gets a higher amount, you get
7 the benefit of that, right?

8 A Right. But that's --

9 Q And that's the way it works?

10 A Yes. But if we ask for it and
11 production comes back and says we can't you on
12 a favored nations basis, we'll alternately
13 waive the favored nations to make the deal
14 happen. Those things happen quite often.

15 Q Now take a look at what we've
16 marked as Exhibit 60 for a minute. And you
17 identify this as a Polygram document?

18 A Well, you had asked if they were
19 all Universal Music Group documents and I
20 pointed out that this preexisted the existence
21 of the Universal Music Group inclusive of
22 Polygram.

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1 Q Right. Just to be clear, though,
2 the files of Polygram have become hallows
3 within Universal Music Group because Universal
4 Music Group acquired Polygram, correct?

5 A That's correct, yes.

6 Q Do you have any reason to believe
7 that this was not produced from the files of
8 Universal Music Group?

9 A No, I have no reason to believe
10 that.

11 MR. STEINTHAL: I would move
12 Exhibit 60 into evidence.

13 CHIEF JUDGE SLEDGE: Any objection
14 to Exhibit 60?

15 MR. HANDZO: No, Your Honor.

16 CHIEF JUDGE SLEDGE: No objection,
17 it's admitted.

18 (Whereupon, the document
19 previously marked for
20 identification as
21 Services Exhibit R-60,
22 was received in

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evidence.)

1
2 MR. HANDZO: Again, I would move
3 the application of the protective order on the
4 same basis as previously.

5 JUDGE WISNIEWSKI: To all this?

6 MR. HANDZO: Actually, Your Honor,
7 I think I could limit the motion to the price
8 itself.

9 CHIEF JUDGE SLEDGE: Mr. Roland,
10 is a 1999 contract?

11 THE WITNESS: Yes, sir.

12 CHIEF JUDGE SLEDGE: Of a company
13 that preceded and was later bought by
14 Universal?

15 THE WITNESS: Yes, Your Honor

16 CHIEF JUDGE SLEDGE: And this
17 price is known by the publisher and the artist
18 and the producer and at least those, and you
19 claim that this is confidential information?

20 THE WITNESS: Your Honor, I don't
21 know if the publisher is aware of this fee.

22 CHIEF JUDGE SLEDGE: Why wouldn't

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1 they be?

2 THE WITNESS: I couldn't
3 speculate, Your Honor.

4 JUDGE ROBERTS: I think the point
5 here, Mr. Roland, is the fact that this is
6 seven years ago.

7 THE WITNESS: I understand, Your
8 Honor.

9 JUDGE ROBERTS: It is obviously no
10 longer the current price.

11 CHIEF JUDGE SLEDGE: Motion is
12 denied.

13 BY MR. STEINTHAL:

14 Q Mr. Roland, this is another
15 license in respect of a James Brown sound
16 recording, is it not?

17 A I'm sorry, repeat the question.

18 Q This is another agreement for the
19 licensing of a sound recording performed by
20 James Brown.

21 A Well, it's a series of requests.
22 It's not the actual agreement.

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1 Q Okay. But it pertains to the song
2 "I Feel Good" by James Brown?

3 A Yes.

4 Q Is "I Feel Good" a very popular
5 track of Mr. Brown's?

6 A Yes, it is.

7 Q Turn if you will to page 106127 to
8 106128. You'll see that in the carry over --
9 well, it's actually the exhibit is cut off.
10 It's better to look at 106126 so you can
11 actually read the last paragraph on page 1 of
12 this letter where the statement is made "At
13 earliest convenience please provide me with a
14 quote for the foregoing use as the music for
15 the film must be submitted March 20," which is
16 11 days after the date of the memo. "It is
17 imperative that I receive a response as soon
18 as possible."

19 Then the next sentence says, and
20 this is on page 1060129, "I forwarded a
21 synchronization proposal to Fort Knox Music on
22 3/6/98. I will advise you as to the sync fee

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1 as soon as I hear back from them."

2 JUDGE WISNIEWSKI: Did you say the
3 next page. Which page are you referring to?

4 MR. STEINTHAL: 106128. What
5 happened in the way it was produced is that --

6 JUDGE ROBERTS: All right. We're
7 going from 126 to 128?

8 MR. STEINTHAL: Right. What
9 appears to be the second page of that letter.

10 JUDGE ROBERTS: Okay. Thank you.

11 BY MR. STEINTHAL:

12 Q The correspondence suggests that
13 at the time the request for a quote was being
14 made as to the master use right for the sound
15 recording, the producer was saying that I
16 forwarded a synchronization proposal to Fort
17 Knox and I will advise as I hear back from
18 them as to that.

19 Is it common for the sound
20 recording company in the process of
21 negotiating a master use license to
22 communicate with the production company about

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1 what the sync fee is going to be?

2 A Is it common for the production
3 company to communicate with the production
4 company?

5 Q No. Is it common for the
6 production company to communicate with the
7 sound recording company about what the
8 production company is doing with respect to
9 the sync rights and what the fee may be with
10 respect to the sync rights at the same time
11 they're negotiating the master use rights?

12 A It's -- it's not common. It
13 happens. Every deal is unique and different,
14 so I can't --

15 Q Well, it's not uncommon, is it,
16 for Universal to seek to find out what the
17 sync fee is going to be in respect to the
18 transaction where it's negotiating the master
19 use fee?

20 A Well, if we employ the favored
21 nations, then there's really no need for us to
22 know what the sync fee is going to be. We rely

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1 on our -- our contracts.

2 Q Okay. Take a look at the last
3 page of this exhibit. Exhibit 106141 -- page
4 106141. I was going to leave that to our
5 imagination.

6 On 106141 do you see there's some
7 handwriting at the top? Does looking at this
8 document, first of all, does this appear to be
9 a communication in relation to the licensing
10 of the sync fee, the sync rights associated
11 with the song? If you look at the second
12 paragraph of the text of the document where it
13 says "Regency has requested the use of the
14 composition entitled 'Heard It Through the
15 Grapevine' performed by Marvin Gaye" it says
16 on top, see that?

17 A I do see that.

18 Q Okay. Does that suggest to you
19 that this relates to composition licensing or
20 sync licensing?

21 A It looks to be addressed to the
22 publishing rights.

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1 Q And the note at the top says at
2 the end of it, "It will be a minimum of
3 \$17,500 MFN with master." Do you see that?

4 A Oh, I'm sorry, where are you
5 referring?

6 Q The handwriting across the top
7 going down towards the right.

8 A Okay.

9 Q The last sentence where it says
10 "It will be a minimum of \$17,500 MFN with
11 master." Is that a fair reading of that
12 comment?

13 A It's very difficult for me to
14 decipher this handwriting, but it's a short
15 cue. It would be a minimum of seventeen five
16 or 1700 MFN with -- I take your word for that
17 that says master.

18 Q And my question is whether it is
19 also not uncommon for publishers in
20 negotiating on the sync rights side of these
21 transactions to seek an MFN against what the
22 sound recording company gets with respect to

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1 master use rights?

2 A I can't speculate as to the
3 frequency of their employment of this
4 provision. But it does happen.

5 Q All right. Let me ask you to look
6 at a few television commercial synchronization
7 licenses.

8 Let me read into the record the
9 documents that are being handed out for
10 identification purposes.

11 The first is Services Rebuttal
12 Exhibit 61, which is a two page document
13 bearing the Bates stamp SX Rebuttal 110632 to
14 110622, subject "Brickhouse."

15 (Whereupon, the document
16 referred to was marked
17 for identification as
18 Services Exhibit R-61.)

19 BY MR. STEINTHAL:

20 Q Services Rebuttal Exhibit 62 is a
21 set of pages bearing the Bates stamp number SX
22 Rebuttal 110878 through 110880 with some blank

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1 pages in there in the manner it was produced.
2 And then a series of pages bearing the Bates
3 stamp number SX Rebuttal 110865 through
4 110870. And that relates to the subject of
5 JCP and FYC, standing for Fine Young
6 Cannibals, which is a band.

7 (Whereupon, the document
8 referred to was marked
9 for identification as
10 Services Exhibit 62.)

11 BY MR. STEINTHAL:

12 Q Exhibit 63 and 64 are two
13 documents bearing the Bates stamp number SX
14 Rebuttal 111331 to 332 and 111320 to 11324,
15 both relating to the track "Gotta Give It Up"
16 by Marvin Gaye.

17 (Whereupon, the
18 documents referred to
19 were marked for
20 identification as
21 Services Exhibits R-63
22 and R-64.)

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BY MR. STEINTHAL:

Q And then Exhibit 65 is a document bearing the Bates number SX Rebuttal 1111443 through 111454, which one gets into the document appears to relate to the licensing of a promotion for Sachi and Sachi. And I'll ask you about that when we get to it.

(Whereupon, the document referred to was marked for identification as Services Exhibit R-65.)

BY MR. STEINTHAL:

Q But these are all again bearing Bates stamp numbers produced by SoundExchange during the course of this proceeding. And my first question to you is whether you can identify these --

JUDGE WISNIEWSKI: What happened to Exhibit 64?

MR. STEINTHAL: Excuse me.

JUDGE WISNIEWSKI: The Levi Strauss?

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1 MR. STEINTHAL: I'm sorry. That's
2 64 and 64, Your Honor. I think it bears Bates
3 stamp 111331 to 2 and then 111320 to whatever
4 the last page of that one was.

5 JUDGE WISNIEWSKI: All right.

6 MR. STEINTHAL: A324. That's the
7 Levi Strauss one. I had identified it by
8 reference to Marvin Gaye instead of Levi
9 Strauss.

10 JUDGE WISNIEWSKI: I see. It just
11 wasn't marked 64.

12 MR. STEINTHAL: Excuse me?

13 I will be precise when we get
14 there.

15 BY MR. STEINTHAL:

16 Q Taking a look at Services Rebuttal
17 Exhibit 61 through 65 can you identify these
18 as materials relating to a television
19 advertising master use licenses?

20 A Yes.

21 MR. STEINTHAL: I would offer
22 Exhibits 61 through 65 into evidence.

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1 MR. HANDZO: No objection.

2 CHIEF JUDGE SLEDGE: Without

3 objection, submitted.

4 (Whereupon, the
5 documents previously
6 marked for
7 identification as
8 Services Exhibits R-61
9 through R-65, were
10 received in evidence.)

11 MR. HANDZO: Once again, I would
12 move the application of the protective order,
13 at least with respect to the prices. I
14 recognize that these documents seem to span a
15 time frame from 2000 to 2004, so it may put
16 some of them on the cusp of the Court's
17 ruling, but I would make that motion.

18 CHIEF JUDGE SLEDGE: Any
19 objection.

20 MR. STEINTHAL: No objection.

21 CHIEF JUDGE SLEDGE: The motion on
22 these expired contracts, some six years old,

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1 some 30 years old on which there is no
2 objection gives great pleasure that we only
3 deal one more day with this protective order
4 and not thereafter. Motion is granted.

5 BY MR. STEINTHAL:

6 Q Mr. Roland, briefly just as to a
7 couple of questions on each of the documents.

8 Exhibit 61, does this appear to be
9 correspondence concerning quotations given by
10 Universal Music Group for a TV sync license
11 associated with the song "Brickhouse" or the
12 track "Brickhouse."

13 A Yes.

14 Q And it states on the first page
15 second to last line from the bottom "Four
16 months," then it gives the dollar figure and
17 "MFN with publisher." And I want to turn your
18 attention on the next page to a communication
19 a woman named Micky Stern. Do you know who
20 Micky Stern is?

21 A Yes, I do.

22 Q Who is she?

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1 A She's a former employee of
2 Universal Music Group, manager of file and
3 television music working in my employ.

4 Q Do you see that there's an email
5 here dated August 20th where she communicates
6 on MFN basis with the publisher I can do a
7 four month license for the dollar figure
8 that's set forth here?

9 A Yes.

10 Q Can you infer from that that was
11 what the quote was from Universal for that
12 particular license?

13 A I don't know Ms. Jarnagin, and she
14 assume she was the client. So, yes, I can
15 make that inference.

16 Q Okay. And then if you look at the
17 underlying email of August 20th from Mary
18 Jarnagin to Ms. Stern, you see where it states
19 in the second paragraph second sentence "My
20 client wants an option of a four month license
21 which I was given a quote of" blank dollars
22 "by here. I'm going to assume MFN with you

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1 master license." Is that something that you
2 can look at and infer that the publisher had
3 quoted a fee that was equal to the amount that
4 Universal had quoted?

5 I should have read the sentence
6 before what I read, which says "I spoke with
7 the publisher this morning for "Brickhouse."

8 A Yes. She doesn't really say that
9 the publisher gave her that quote, but you can
10 draw the inference if she is saying she was
11 given a quote by her client. I'm assuming that
12 this woman was hired by an ad agency to clear
13 music. So perhaps a publisher communicated to
14 her client that's what she wanted, and she's
15 saying her client communicated to her a fee of
16 \$75,000.

17 Q But can you infer from this that
18 the publisher had communicated they were
19 willing to license for the same figure that
20 the sound recording company was, and have
21 requested an MFN against the master license
22 owner?

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1 MR. HANDZO: I am just going to
2 object to further questions along this line
3 since the problem at this point is,
4 apparently, Mr. Roland doesn't even really
5 know who the person on the other side is and
6 who they are representing.

7 MR. STEINTHAL: I think the
8 witness has drawn some inferences from his
9 experience earlier today, and that's all I'm
10 asking him to do here.

11 MR. HANDZO: And I don't have a
12 problem with him drawing inferences where he's
13 got something to draw it from. Where he
14 doesn't even know who the players are in this
15 email, that's taking it a little far.

16 CHIEF JUDGE SLEDGE: And your
17 question dealt with asking him to infer that
18 a certain party whose not identified is making
19 an offer?

20 MR. STEINTHAL: I asked him
21 whether he can infer from this communication,
22 and he's identified one of the people involved

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1 in the communication, which was the person at
2 Universal. Whether he can infer from the back
3 and forth that in fact the publisher had
4 quoted a fee equal to what the sound recording
5 company had quoted and also asked for an MFN
6 against the master rights owner.

7 CHIEF JUDGE SLEDGE: And he says
8 in this communication he doesn't know whose
9 the publisher.

10 MR. STEINTHAL: Well, I don't
11 think he needs to know who the publisher is to
12 infer from what's stated here, that the
13 publisher whoever it was had made that quote
14 and asked for an MFN relative to the master
15 rights owner.

16 CHIEF JUDGE SLEDGE: If he can
17 give an opinion, I'll overrule the objection.

18 THE WITNESS: My only confusion,
19 Your Honor, is I don't know who the publisher
20 gave a quote to. My inference is the
21 publisher gave a quote to her client who is
22 unnamed and she's passing along information to

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us that her client spoke to the publisher and that her client told her to ask of us \$75,000 on an MFN basis. So my confusion is who told what who.

BY MR. STEINTHAL:

Q Without knowing who said what to whom, you can though infer that the back and forth between the publisher and the back and forth with the master rights owner here, Ms. Stern, was such that each of the publisher and sound recording owners were asking for the same fee and each asking for reciprocal MFN, isn't that right?

A Or I can infer that we're being offered \$75,000 on that basis.

Q All right. Let's move to Exhibit 62. Do the documents comprised in Exhibit 62 relate to the licensing of a track called "She Drives Me Crazy" by the Fine Young Cannibals in connection with a television synchronization license?

A With respect to an advertising

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synchronization license? " " " "

Q Yes.

A Yes, sir.

Q And "She Drives Me Crazy," was that a very popular track by Fine Young Cannibals?

A It was.

Q And you identified Ms. Stern
before. Who is Karen Wolfe?

A Karen Wolfe also a former employee of UMG charged with contract administration in my department.

Q And does that first page appear to be some correspondence with the advertising agency involved with the sync license?

A Yes, it does.

Q In the text of the first two paragraph on the first page it says "Thanks for the licenses for 'She Drives Me Crazy' by Fine Young Cannibals. Our attorney is reviewing them. We had to increase the fee to" and then it states a number "in order to come

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1 to terms with the publisher. Since it is an
2 MFN deal, I will need a revised invoice from
3 you," meaning Universal, "reflecting the" fee.
4 "I need an original invoice. Can you
5 overnight it or email it to me?"

6 Is this an example of a
7 circumstance where Universal had initially
8 quoted a lower master use fee and because the
9 publisher had received somewhat more than
10 that, Universal was given the benefit of the
11 MFN clause?

12 A This is an example of that where
13 we actually benefitted from it, yes.

14 Q Take a look, if you will, at
15 Exhibit 63 and 64. These documents relate to
16 another TV sync license relating to the track
17 "Gotta Give It Up" by Marvin Gaye for a Levi
18 Strauss advertising campaign?

19 A Yes.

20 Q And the handwriting on the first
21 page towards the bottom right above your
22 initials "Were approved as noted," do you see

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1 that?

2 A Yes, I do.

3 Q And can you just make out what the
4 handwriting is above your signature?

5 A That's my handwriting.

6 Q And above that does that say "MFN
7 with publisher"?

8 A It does.

9 Q Okay. And that's the same kind of
10 MFN clause you've identified before?

11 A Yes.

12 Q And this document actually
13 includes a formal license agreement, that's
14 Exhibit 64. Is this a Universal form of
15 agreement that it uses for television
16 synchronization licenses?

17 A This is our standard advertising
18 form.

19 Q Okay. And in paragraph 10 on page
20 Services Rebuttal 111322 the standard MFN
21 language used in the formal agreements?

22 A Excuse me, which paragraph?

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1 Q Paragraph 10 at the bottom of
2 111322.

3 A And what was the question?

4 Q Whether this is the standard
5 language you use in connection with these
6 kinds of licenses to secure an MFN?

7 A This looks to be a standard MFN
8 clause, yes.

9 Q Take a look at Exhibit 55, if you
10 would? The first few pages look like
11 handwritten notations, the third page of which
12 appears to be on a notepad of Don Terbush of
13 Universal. And the document appears to relate
14 to the licensing of the Lyle Lovett track
15 "Summer Wind" in connection with a Lexus
16 commercial. Is that an accurate summary?

17 A Yes, it is.

18 Q Lyle Lovett is a well-known artist
19 that you know?

20 A He is fairly well known.

21 Q I like him a lot.

22 A I do, too.

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1 Q On the first page can you tell me
2 whose handwriting it is on the notation on the
3 first page?

4 A I don't recognize the handwriting.

5 Q You see that under the third page
6 on Mr. Terbush's notepad, can you recognize
7 that Mr. Terbush's handwriting?

8 A I don't think I could identify his
9 handwriting. I would make the assumption that
10 it's his, however he doesn't sign the
11 document. But I could make that assumption.

12 Q Okay. And could you make that
13 assumption about the note on the first page in
14 light of that?

15 A They appear to be similar. i'm not
16 an expert on handwriting by any stretch of the
17 imagination.

18 Q Fair enough.

19 The PS on the first page says:
20 "PS: I think they really want to use this so
21 you may not want to lower." Does this suggest
22 to you that one of the people on your staff

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1 was noting that the advertising agency here
2 really wanted this particular Lyle Lovett
3 track for this particular campaign?

4 A Yes.

5 Q If we could go back now to your
6 witness statement for a couple of questions.
7 I'll turn to the last few documents that
8 were--

9 A I'll put the others up here.

10 Q Okay. Great.

11 If you go to your witness
12 statement, on page 4 you make a statement in
13 the first full paragraph in the second
14 sentence "Significantly, unlike a film,
15 television or advertisement producer, a music
16 service needs the most popular recorded
17 version of a musical composition not any
18 version and needs a broad range of sound
19 recordings to offer on its service not a
20 single recording or a few to serve as
21 background music." Do you see that?

22 A Yes, I do.

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1 Q When you refer to the need for a
2 broad range of sound recordings to offer on
3 its service, would you include in that
4 category, for example, the Universal Music
5 Group --

6 A Yes, I would.

7 Q -- catalogue?

8 A Yes.

9 Q Are you familiar with the fact
10 that Yahoo! webcasting service, or at least
11 the customized stations on Yahoo! webcasting
12 service went for more than a year and a half
13 without access to Universal Music Group sound
14 recording?

15 A I'm not aware of that.

16 Q Would it change your testimony if
17 you knew as a factual matter that a digital
18 music service that doesn't provide interactive
19 on demand streaming could survive a year and
20 half without Universal's catalogue, would that
21 effect the testimony you've given on that
22 subject?

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1 MR. HANDZO: I'm going to object,
2 because I think that actually mischaracterizes
3 the record here with respect to customer
4 versus the MCA compliant. And I don't want to
5 actually make a speaking objection that tells
6 what my concern is, but I think it
7 mischaracterizes the record to say that Yahoo!
8 went without Universal content. It didn't.

9 MR. STEINTHAL: Well, my question
10 was whether it went without it on its
11 customized program stations. I think that is
12 an accurate rendition of what the record is.

13 CHIEF JUDGE SLEDGE: Mr. Roland,
14 if you will step out in the hallway, we'll
15 address this matter further.

16 THE WITNESS: Okay.

17 (Whereupon, the witness exits the
18 courtroom.)

19 CHIEF JUDGE SLEDGE: Outside the
20 presence of the witness.

21 The objection is that the question
22 assumes facts that are not in evidence.

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1 MR. HANDZO: Yes, Your Honor

2 CHIEF JUDGE SLEDGE: And what the
3 evidence is is disputed?

4 MR. HANDZO: And, in fact, just to
5 elaborate now that the witness isn't here,
6 those custom radio channels that Mr. Steinthal
7 is referring to are part of the Launchcast
8 product that Yahoo! offers. So Yahoo! had
9 Universal content through Launchcast. It
10 didn't have it on those particular channels
11 that it wanted to offer as custom. But the
12 Yahoo! Launchcast service, of which those
13 custom channels are just a part, had Universal
14 content.

15 So I think it's just a misleading
16 question to ask him, you know, don't you think
17 that a webcasting service can get along
18 without Universal content. Because Universal
19 content was part of Launchcast, just not part
20 of the bells and whistles that they offered on
21 the custom channel.

22 CHIEF JUDGE SLEDGE: Mr.

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1 Steinthal?

2 MR. STEINTHAL: I don't think that
3 there's any question that the evidence
4 reflects that Yahoo! went without Universal
5 content on the customized aspects of its
6 offering for more than a year, almost two
7 years.

8 I asked the witness whether he was
9 aware of that. He said not. And I'm simply
10 asking him whether if he were aware of that,
11 it would effect his testimony.

12 CHIEF JUDGE SLEDGE: Well, as
13 stated then the objection is sustained. But
14 it has to be more clarified to be a permitted
15 question.

16 Thank you.

17 (Whereupon, the witness resumes
18 the stand.)

19 BY MR. STEINTHAL:

20 Q Mr. Roland, I gather you were not
21 aware, were you, that Yahoo! went without
22 using Universal Music Group content on the

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1 customized radio stations in terms of that
2 part of Yahoo! online radio offering?

3 A That's correct.

4 Q Were you aware that Yahoo! in fact
5 had operated for that period of time without
6 Universal content, would that have effected
7 the testimony you gave?

8 MR. HANDZO: I don't think that
9 actually resolves my objection because still
10 in the question the witness leaves out the
11 part of the equation that was expressing
12 concern about before.

13 CHIEF JUDGE SLEDGE: Mr.
14 Steinthal?

15 MR. STEINTHAL: I don't think
16 there's anything missing that would be
17 required to have the witness address whether
18 his failure to consider that particular fact
19 would change his testimony.

20 CHIEF JUDGE SLEDGE: To be
21 reflective of the evidence you have to have
22 the rest of the facts. Objection is

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1 sustained.

2 MR. STEINTHAL: All right.

3 BY MR. STEINTHAL:

4 Q In connection with this question
5 let me represent to you that Launchcast has a
6 preprogrammed part of its radio stations and
7 a customized part of its radio offerings where
8 consumer can rate songs and provide certain
9 information that has an effect to some degree
10 on the playlist generation. But there's still
11 no on demand functionality. And there's a
12 dispute between Universal Music Group and
13 Yahoo! as to whether the customization
14 features take those stations outside of the
15 scope of a compulsory license under Section
16 114.

17 So with that as a backdrop, and
18 you testified that you weren't aware that in
19 fact Yahoo! operated for a period of about a
20 year or more with Universal content on the
21 customized part of its programming. Had you
22 know that, would that have affected your

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1 testimony with respect to the passage that I
2 read to you on page 4?

3 A Had I know that, I would have had
4 several other questions. How successful were
5 they compared to other services that perhaps
6 had the Universal music catalogue, how
7 successful they were in generating revenues,
8 et cetera. I personally haven't listened to
9 Yahoo! so I don't know.

10 Q Okay. Turn to page 5 of your
11 testimony, if you would? Your discussion here
12 about the potentiality of re-recording songs,
13 re-recording tracks for purposes of a movie or
14 a TV show. You would agree, would you not,
15 that -- and I may have asked you this and I
16 apologize if I have, but you would agree with
17 the proposition, wouldn't you, that there are
18 circumstances where a producer wants to have
19 a particular sound recording and therefore
20 these other alternatives that you posit really
21 aren't alternatives for their purposes?

22 A Yes, but I have no way of knowing

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1 what his desires are, so the game I have to
2 play is am I one of those, am I in contention
3 or am I -- am I running the risk of getting
4 supplanted by any number of alternates?

5 Q And part of your game is to try to
6 figure that out, right, so that you can access
7 what your bargaining leverage is in a given
8 situation?

9 A Part of the game.

10 Q And when you talk about at the
11 bottom of page 5 going over to page 6 you use
12 the Village People as an example where they
13 sometimes re-record on a different label. Do
14 you remember giving that example?

15 A I basically stated that they've
16 re-recorded for themselves, I believe. And I
17 believe they --

18 Q They then own the sound track of
19 it?

20 A Then they own the new recording.

21 Q So in fact even in that situation
22 the sound recording itself is being paid for,

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1 it's just you're not getting paid for it,
2 right?

3 A Correct.

4 Q Now, on page six in section 4 you
5 talk about low quality sound recording, you
6 see that at the beginning of the second
7 paragraph there?

8 A Yes, I do.

9 Q Now, I gather that low quality
10 sound recordings are just one part of the
11 supply of sound recordings available to
12 producers of TV shows and movies?

13 A Yes.

14 Q You don't dispute the proposition,
15 do you, that the general practice is that sync
16 and master use rights fees tend to be the same
17 or substantially the same in most TV and film
18 sync licenses, correct?

19 A I do. Each deal is different
20 subject to enumerable variables in each
21 circumstance.

22 Q I understand that the absolute

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1 amount changes a lot, but in terms of the sync
2 to master ratio you'd agree with me that many
3 more times than not the price that the sync
4 holder gets and the price that the master use
5 gets is the same, in part as a function of the
6 MFN clause?

7 A I don't know because I don't
8 generally learn what a publisher's quoting.

9 Q Okay. Well, let me ask you this
10 question: Do you have any reason to believe
11 that the ratio of what the master use holder
12 gets in terms of its fees relative to what the
13 sync holder gets for his fee is any different
14 in the submarket of low quality sound
15 recordings you refer to on page 6 as
16 distinguished from the rest of the market of
17 sound recordings?

18 A If I understand your question, I
19 believe that in the circumstance where a
20 producer is using a low quality sound
21 recording or a library cue that the publisher
22 who happens to own the library is getting 100

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1 percent of the fee.

2 Q That's the production library
3 example you were talking about?

4 A There's no delineation between
5 master and sync. It's a hot shot deal, one
6 stop shopping.

7 Q And do you know in fact that the
8 story Dr. Jaffe did in connection was master
9 use and sync rights excluded those kinds of
10 situations?

11 A I don't know that. I didn't read
12 the report.

13 Q Turning to page 7, and this
14 morning you testified, did you not in
15 reference to this part of your written
16 testimony, that your understanding is that
17 music publishers on the one hand try to earn
18 the maximum they can get out of a sync
19 license, right?

20 A Correct.

21 Q And the sound recording companies
22 don't always do that, right?

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1 A That's correct.

2 Q You'd agree with me, wouldn't you,
3 that doesn't matter really the sound recording
4 company tries to or not as long as it employs
5 an MFN against the outcome of the negotiation
6 that the publisher has over the sync rights,
7 right?

8 A I'm sorry. I don't understand the
9 question.

10 Q Well, let me get this right. Even
11 if the sound recording owner, as you
12 testified, doesn't have the same incentive to
13 maximize the amount of the fee that it's going
14 to get as compared to a music publisher,
15 wouldn't you agree with me that whenever you
16 use an MFN clause as against the outcome of
17 the sync rights transaction, you effectively
18 get the benefit of the higher fee anyway?

19 A In the circumstances where we
20 would accept a lower fee, we wouldn't employ
21 the clause. And in the circumstances where we
22 have employed, we've often been asked to waive

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1 to ensure not being usurped by a satellite or
2 a re-record.

3 Q But in the circumstances where you
4 use an MFN you would agree with me, wouldn't
5 you, that whatever the incentive of the sound
6 recording owner may have been, the outcome is
7 by seeking in getting an MFN you get the
8 benefit of whatever the publisher got and it
9 tried to maximize the revenues that could flow
10 from that transaction, right?

11 A That's the general purpose of an
12 MFN.

13 CHIEF JUDGE SLEDGE: Let the
14 record the answer was yes.

15 THE WITNESS: Yes, Your Honor.

16 BY MR. STEINTHAL:

17 Q Just one more thing. I want to
18 show you two documents that we've marked as
19 Services Rebuttal Exhibit 66 and 67 and ask
20 you a couple of questions about that.

21 (Whereupon, the

22 documents referred to

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1 were marked for
2 identification as
3 Services Exhibits R-66
4 and R-67)

5 BY MR. STEINTHAL:

6 Q Exhibit 66 is a document with the
7 caption Lisa Loeb "the Very Best of January
8 24, 2006," and it bears the Bates stamp number
9 SX REB006809 through 006819. And Exhibit 67
10 is a document bearing the caption Diana Ross
11 and the Supremes "The Number Ones" marketing
12 plan. And it bears the Bates stamp number SX
13 REB033843 to 033855.

14 And my first question to you, sir,
15 is whether you can identify these two
16 documents?

17 A Yes, I can.

18 Q Can you tell me what they are?

19 A These are marketing plans for a
20 forthcoming -- at the time, a forthcoming
21 release by UME.

22 Q UME is what?

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1 A It's a label within the Universal
2 Music Group, Universal Music Enterprises, and
3 it's the company that I directly report
4 through.

5 Q And is Exhibit 66 such a document
6 with respect to Lisa Lobe and Exhibit 67 such
7 a document with respect to Diana Ross and the
8 Supremes?

9 A Yes.

10 MR. STEINTHAL: I'd move Exhibit
11 66 and 67 into evidence.

12 CHIEF JUDGE SLEDGE: Any objection
13 to Exhibit 66 and 67?

14 MR. HANDZO: No, Your Honor.

15 CHIEF JUDGE SLEDGE: Without
16 objection, the two exhibits are admitted.

17 (Whereupon, the
18 documents previously
19 marked for
20 identification as
21 Services Exhibits R-66
22 and R-67 were received

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in evidence.)

1
2 MR. HANDZO: And I would move to
3 apply the protective order, Your Honor. These
4 are marketing plans for our internal -- the
5 company actually regards these as quite
6 sensitive in terms of how it intends to
7 promote and market its artists. And certainly
8 Lisa Lobe is really quite recent and the Diana
9 Ross one, I believe, is current as well.

10 CHIEF JUDGE SLEDGE: Any
11 objection, Mr. Handzo?

12 MR. HANDZO: No objection, Your
13 Honor.

14 CHIEF JUDGE SLEDGE: Without
15 objection, the motion is granted.

16 BY MR. STEINTHAL:

17 Q Mr. Roland, what are the purpose
18 of these two documents within Universal Music
19 Group?

20 A Within UME I can speak to that,
21 sir. We try to have a comprehensive marketing
22 plan for each release or each priority

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1 release, I should say, since we release quite
2 a bit of albums. This encompasses every facet
3 of UME's marketing team. This is created by
4 what we refer to as a product manager, but it
5 encompasses sales, consumer marketing, radio,
6 TV advertising which is separate from what I
7 do. This is more taking out spots for the
8 record. Video promotion, perhaps. Publicity.
9 Online marketing, I-tunes and whatnot.
10 Retail.

11 Often we have a component, we
12 being TV, in this case we do. Part of what we
13 might do for the record in anticipation of a
14 release. And then a general time line toward
15 the back, page 815 of when these things should
16 happen or what's been planned.

17 Since this artist, Lisa Lobe,
18 particularly active in this time period, she
19 had her own TV show. There's a bunch of facts
20 and tidbits about what's going on for her
21 promotionally and whatnot. I mean, it may be
22 separate from what we are doing.

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1 The name on the back is usually a
2 contact list.

3 And this is generally an internal
4 document. We use it sort of our outline of
5 what's going to happen. We judge ourselves
6 against it. We meet about these plans in a
7 fairly frequent basis. We make sure of these
8 plans with the artist's management.

9 Q Now with respect to the Lisa Lobe
10 document, first of all, would you turn to page
11 SX 6814? See there's a category TV/film
12 licensing?

13 A Yes.

14 Q Does this section reflect that one
15 of the goals of Universal Music Group at the
16 time it was planning to release or releasing
17 the new Lisa Lobe album was to seek to secure
18 TV and film licensing opportunities?

19 A That's correct.

20 Q That was a relevant part of what
21 Universal was planning to do as the album was
22 being released?

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1 A Yes.

2 Q And in terms of the online
3 marketing associated with the release of the
4 album, do you see in the section right above
5 TV film licensing there are references to the
6 second to last bullet are site placement and
7 email blasts to or with a number of companies
8 including I-tunes and Yahoo! Music and
9 Microsoft Music, do you see that?

10 A Yes, I do.

11 Q And were those also part of the
12 marketing plans for the new release?

13 A Yes, they were.

14 Q Take a look, if you will, at the
15 Diana Ross document, Exhibit 67 and in
16 particular at page 33847. Again, there's a
17 category for TV and film licensing. Is this
18 another example of a situation where when the
19 new release was coming out Universal made a
20 plan as part of its marketing efforts to get
21 as much TV and film licensing of tracks on the
22 new album as possible?

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1 A Yes.

2 Q And that's basically all I have
3 for you. Thank you very much.

4 A Thank you.

5 CHIEF JUDGE SLEDGE: Mr. Handzo,
6 any further questions?

7 MR. HANDZO: Yes, Your Honor.

8 CHIEF JUDGE SLEDGE: We haven't
9 done Broadcasters yet?

10 MR. HANDZO: I had assumed, Your
11 Honor, that they gave all their time to Mr.
12 Steinthal.

13 CHIEF JUDGE SLEDGE: All right.

14 MR. KIRBY: This will be only five
15 minutes, I believe, Your Honor.

16 CHIEF JUDGE SLEDGE: Mr. Kirby,
17 you'll do it?

18 MR. KIRBY: Yes.

19 CHIEF JUDGE SLEDGE: All right.
20 Go ahead.

21 CROSS EXAMINATION

22 BY MR. KIRBY:

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1 Q Mr. Roland, I'm Tom Kirby.

2 A Nice to meet you.

3 Q Yes.

4 Did I hear you say that you
5 typically do not find out what the publishers
6 received in the licensing deals that your
7 group does?

8 A Typically we don't seek that
9 information.

10 Q And typically you don't learn it?

11 A We may learn it in a favored
12 nations context.

13 Q And I'm still trying to figure
14 out, typically more often than not do you
15 learn what the publishers get or not?

16 A Typically more often than not we
17 don't seek to learn or find out, and with the
18 clause it's sort of irrelevant what they're
19 getting. There's that mechanism there that
20 would ensure parity in that circumstance.

21 Q Okay. So when you say that there
22 is no such thing as a standard license you are

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1 not saying that publishers and recording
2 companies don't typically get the same amount,
3 are you, because you just don't know?

4 A Every circumstance is different.

5 Q You just don't know whether
6 publishers and recording companies typically
7 get the same amount, do you?

8 A Generally I don't know.

9 Q All right. So when you say
10 there's no such thing as a standard deal, that
11 doesn't tell us anything about whether or not
12 recording companies and publishers get the
13 same amount?

14 A I referred more to when we get a
15 request how we structure the deal based on
16 duration of use, how we price the piece of
17 music, how the production is using it. When
18 I made reference to there's no standard deal,
19 I was referring to how we work these things
20 out.

21 All of our contracts, on the other
22 hand, the actual licenses, are fairly

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1 standard. So I don't know if you're drawing
2 a comparison there.

3 Q No. I just want to be clear as to
4 what your testimony is. Page 2, for example,
5 you say there is no standard rate that is
6 charged for uses. Do you remember making that
7 statement?

8 A Yes, I do.

9 Q By saying there's no standard
10 rate, you weren't saying that recording
11 companies and publishers don't typically get
12 the same amount, were you?

13 A I'm saying we don't have a rate
14 card, we don't have pricing policies. Each
15 deal is negotiated by the deal maker.

16 MR. KIRBY: I believe, Your Honor,
17 that's all I have.

18 CHIEF JUDGE SLEDGE: Mr. Kirby, I
19 never heard an answer to your question. Do
20 you know the ratio between what's typically
21 paid between the publisher and the sound
22 recording?

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1 THE WITNESS: No --- No, I don't.

2 -----CHIEF JUDGE SLEDGE: Mr. Handzo?

3 MR. HANDZO: I have nothing, Your
4 Honor.

5 CHIEF JUDGE SLEDGE: Any questions
6 from the Bench?

7 Mr. Taylor?

8 MR. TAYLOR: NPR has nothing, Your
9 Honor.

10 CHIEF JUDGE SLEDGE: Thank you.

11 Any questions from the Bench?

12 Thank you, sir. That ends your
13 testimony.

14 (Whereupon, the witness was
15 excused.)

16 MR. HANDZO: Your Honor, I
17 expected to have to apologize for having a
18 short day today, but apparently we'll pick up
19 tomorrow with Mr. Eisenberg.

20 CHIEF JUDGE SLEDGE: We will
21 conclude tomorrow with Mr. Eisenberg.

22 MR. HANDZO: Yes, we will.

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1 CHIEF JUDGE SLEDGE: And that will
2 be the last day that this protective into.

3 We'll recess until 9:30 in the
4 morning.

5 (Whereupon, at 4:29 p.m. the
6 hearing was adjourned, to reconvene tomorrow
7 at 9:30 a.m.)
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The Digital Performance Right in
Sound Recordings and Ephemeral
Recordings
Webcasting Rate Adjustment
Proceeding

Before:

Copyright Royalty Board
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Date:

November 30, 2006

Place:

Washington, D.C.

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John Mongoven